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VYAVASTHÁ-DARPANA,

A DIGEST

OF

HINDÚ LAW,

AS CURRENT IN BENGAL,

COMPRISING VYAVASTHÁS OR PRINCIPLES DEDUCED FROM SANSKRIT BOOKS OF PARAMOUNT AUTHORITY, VIZ:—THE DÁYA-BHÁGA, DÁYA-TATTWA, DÁYA-KRAMA-SANGRAHA, &c., WITH AUTHORITIES AND INTERPRETATIONS, &c., FROM THOSE BOOKS AND OTHER SOURCES, ANNOTATIONS FROM THE PRINCIPLES AND ELEMENTS OF HINDÚ LAW, &c., ALSO PRECEDENTS OF THE PRIVY COUNCIL, THE LATE SUDDER AND SUPREME COURTS, THE PRESENT HIGH COURTS OF CALCUTTA, ALLAHABAD, BOMBAY, AND MADRAS; ALSO ADMITTED LEGAL OPINIONS, AND RESPONSA PRUDENTUM,

BY

SHYÁMÁCHARAN SARKÁR VIDYÁ-BHÚSHAN,

FELLOW OF THE CALCUTTA UNIVERSITY, LATE TAGORE LAW PROFESSOR, AUTHOR OF TWO DIGESTS OF MUHAMMADAN LAW, OF THE VYAVASTHÁ-CHANDRIKÁ, AND OTHER WORKS.

COMPLETE IN ONE VOLUME

IN TWO PARTS.

THIRD EDITION

ENLARGED AND IMPROVED.

"Law is the king of kings, far more powerful and rigid than they; nothing can be mightier than law, by whose aid, as by that of the highest monarch, even the weak may prevail over the strong."

A text of the *Veda* translated by Sir W. Jones, according to the gloss of *Sankara*.

CALCUTTA:

PRINTED BY I. C. BOSE & CO., STANHOPE PRESS, 249, BOW-BAZAR STREET, AND PUBLISHED BY DÍNANÁTH SARKÁR, 70, JAUN BAZAR STREET.

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OPINIONS ON THE FIRST EDITION.

BABOO SHAMA CHURN SIRCAR.

MY DEAR SIR,

I am extremely sorry that pressure of business has prevented me from examining your book as attentively as I wished and still hope to do. The passages at which I have looked seem to me to afford very satisfactory proof of your industry, research, and learning; and I hope that you will soon find time to complete a work which will, I think, do you credit, and be useful to all who in this country are concerned in the administration of justice or the exposition of Hindú Law.

Yours very faithfully,

18*th March* 1859. JAMES WM. COLVILE.

DEAR SIR,

I thank you for the precious present of a copy of the first volume of your *Vyavasthá-Darpana.* On a cursory perusal of several portions of the work, I am justified in pronouncing it to be an indispensable companion to the judge, the pleader, and the legal student in Bengal. I cannot sufficiently admire the spirit of research, zeal, and industry with which you have collected useful information from varied and scattered sources, and the talent you have displayed in their judicious arrangement, whereby you have rendered the most intricate branch of the Hindú Law level to all capacities and the most easy of reference. You have quoted the most reputed Sanskrit authorities of the Bengal School, and given literal and terse Bengali versions.

I fully concur with you in believing that a vernacular translation of a comprehensive Digest of the Hindú Law will, in a great measure, correct the evil of the non-discussion of any points of this law in the lower courts, and deeply regret that, owing to an unfortunate circumstance, the continuation of Macnaghten's Precedents, down to the present time, is impracticable.

I conclude with recommending the work to public patronage, and expressing a hope that the success of your present undertaking will incite you to further useful pursuits.

I remain,

Sukhachara, 18*th December* 1859. Your obedient Servant,

RADHA KAUNT.

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MY DEAR SIR,

I have perused your *Vyavasthá-Darpana*, and have much pleasure to state that the work is ably edited and is highly creditable to you. The digested index of the *Vyavasthás* and precedents, contained in the work, is so carefully and systematically arranged that it will afford every facility for reference on the Hindú Law as current in Bengal; and I cannot but give you due credit for the amount of research and industry bestowed in compiling it.

The work in question will be highly useful to all, and particularly to those in the legal profession; and I hope it will meet with due support from the public.

Yours faithfully,

10*th December* 1859. PROSUNNO COOMAR TAGORE.

MY DEAR SIR,

I have perused your work on the Hindú Law with much attention. I think you have been singularly felicitous in collecting and digesting the materials on the different points of the law, particularly those on which differences of opinion have prevailed. Your work supplies some omissions in Sir W. Macnaghten and other writers; and you have done great service to those who have occasion to resort to law, by bringing to bear the most approved and governing decisions of the highest courts on difficult and intricate points, about which learned *Pandits* are disagreed. I can assure you that, during the short time the work has been in my hands, I have consulted the work on more than one important occasion with great advantage. To my mind it is an indispensable companion for every pleader; and no court which has to adjudicate on points of Hindú Law ought to be without it for constant reference.

Yours sincerely,

30*th December* 1859. RUMA PROSAUD ROY.

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No. 2251.

From

LORD H. ULICK BROWNE,

Register of the Sudder Dewany Adawlut,

To

E. H. LUSHINGTON, Esq.,

Secretary to the Government of Bengal.

Dated Calcutta, the 9th December 1861.

I am directed to acknowledge the receipt of Mr. Under Secretary Bell's letter, No 429B., dated the 14th March last, forwarding, for the Court's opinion as to its merits and utility, the first volume of a work on Hindoo Law in Sanscrit, Bengalee and English, by Baboo Shama Churn Sircar.

2. In reply I am directed to state that the object of the author in compiling the work is fully set forth in his preface (pp. xxxii—xxxix), and the Court think that the work in question, which is one of great accuracy and learning, being in the vernacular as well as in the English language, will be a most useful work, and one which will afford to the Subordinate Courts, and to the Pleaders attached to them, the means of acquiring a practical knowledge of the Hindoo Law, which is now scarcely attainable by them for want of a good work of reference. They accordingly recommend the work for the patronage of the Lieutenant-Governor.

I have, &c.,

(Signed) H. U. Browne, *Register.*

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ERRATA, CORRIGENDA

OF PRINCIPLES.

Page.	*Line.*			
27	3	for "is also"	... *read*	"is held."
55	33	„ "can"	... „	"is competent to."
56	1	„ "such reversionary heir"	„	"reversionary heir of her husband."
60	9	„ "heritable right"	... „	"heritable right, without death, natural or civil."
86	4	„ "other"	... „	"the rest of the."
86	9	after "succession"	... *add*	"though enumerated in the order of succession."
127	21	after "property"	... „	"*Ibid.*"
131	33	for "159"	... *read*	"160."
136	18	omit "son."		
136	29	for "in the preceding page"	„	"in page 134."
139	28	*add* "Vide Precedents, page 751."		
148	7	„ "899, 900."		
152	10	after "supplied"	... *add*	"to the widow and the like."
166	15	*add* "Vide Precedents, pages 383—391."		
177	5	after "grandfather"	... *add*	"great-grandfather."
190	40	after "who is"	... „	"impotent and."
216	30	for "562"	... *read*	"560."
231	4	„ "a maiden"	... „	"an unmarried."
231	5	„ „	... „	„
249	5	„ "796"	... „	"196."
412	18	„ "Section VI"	... „	"Section VII."

OF PRECEDENTS.

Page.	*Line.*			
7	31	omit the whole line.		
17	7	for "105"	... *read*	"199—217."
23	18	„ "Respondents"	... „	"Respondent."
58	2	„ "1862"	... „	"1852."
70	20	„ "1874"	... „	"1864."
86	34	„ "(Plaintiffs,) Respondents"	„	"(Plaintiff,) Respondent."
91	37	„ "Rabi-uddin"	... „	"Rahimuddin."
110	23	„ "she"	... „	"it."
113	18	„ "*Ibid.*"	... „	"W. R."
159	18	„ "Choudhuri"	... „	"Chakrabartty."
259	22	after "*Ibid.*"	... *add*	"Section vi."
263	8	for "v"	... *read*	"vi."
353	10	„ "29"	... „	"23."
370	7	„ "that"	... „	"what."
823	Head	„ "Exclusion"	... „	"Minority and Guardianship."
825	„	„ „	... „	„ „
827	„	„ „	... „	„ „
829	„	„ „	... „	„ „
831	„	„ „	... „	„ „
926	1	„ "Chapter IV"	... „	"Section V."

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PREFACE

To the First Edition.

The Hindú Law is, according to our belief, of divine origin. It is termed *Smriti* (remembrance) or what was remembered, in contradistinction to the *Veda*, which is denoted *Sruti* (audition) or what was heard.* The *Smriti* was revealed by the *Self-Existent* to Manu, who remembered and taught it to Maríchi and nine other sages,† one of whom, Bhrigu, being appointed by Manu to promulgate his laws, communicated the whole to the *Rishis*.‡

The *Smriti* comprises three *kándas* or *adhyáyas* (books or parts.) The *áchára* (ritual,) which comprises rules for the observance of religious rites and ceremonies, social usages, and moral duties of the different castes; the *vyavahára* (civil acts and rules,) which embraces as well forensic law and practice as rules of private acts and contests; and the *Práyashchitta* (expiation,) which prescribes the atonement or religious penalty for sin. The general body of law comprehending all these is denominated the *Dharma Shástra*.

The *Dharma Shástra* is to be sought primarily in the *Sanhitás* (collections or institutes) of the holy sages, whose number according to the list given by Jágna-

* By these terms, it is signified that in the *Veda* the words of revelation are preserved, while in the system of law the sense is recorded either in the divine words or other equivalent expressions. The *Veda* chiefly concerns religion, but contains a few passages directly applicable to jurisprudence.

† Maríchi, Atri, Angirá, Pulastya, Pulaha, Kratu, Prachetá, Vashishtha, Bhrigu and Nárada. These are denominated Prajápati, or lords of created beings. See Manu, Ch. i, *v.* 35—40 and 57—60.

‡ *Vide* Manu, Ch. i, *v.* 57—60.

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VALKYA is twenty: namely, MANU, ATRI (a,) VISHNU (b,) HÁRÍTA, JÁGNAVALKYA or YÁJNAVALKYA (c,) USHANÁ (d,) ANGIRÁ (e,) JAMA or YAMA (f,) A'PASTAMBA, SAMVARTA, KÁTYÁYANA, VRIHASPATI (g,) PARÁSHARA (h,) VYÁSA (i,) SANKHA and LIKHITA, DAKSHA (j,) GOUTAMA (k,) SÁTÁTAPA and VASHISHTHA (l).—PARÁSHARA, whose name appears in the above list, enumerates also twenty select authors; but instead of JAMA, VRIHASPATI, and VYÁSA, he gives KASHYAPA, GÁRGYA (m,) and PRACHETÁ (n).—The *Padma-purána* omitting the name of ATRI which is found in JÁGNAVALKYA's list, completes the number of thirty-six by adding MARÍCHI (o,) PULASTYA (p,) PRACHETÁ (n,) BHRIGU, NÁRADA (q,) KASHYAPA, VISWÁMITRA (r,) DEVALA (s,) RISHYA-SRINGA (t,) GÁRGYA (m,) BOUDHÁ-

(a) One of the ten lords of created beings, and father of DATTÁTREYA, DURVÁSÁ and SOMA.

(b) Not the Indian divinity, but an ancient philosopher who bore that name.

(c) Grandson of VISWÁMITRA, as described in the introduction of his own institutes.

(d) *Ushanā* is another name of *Shukra*, the regent of the planet *Venus*: he was grandson of BHRIGU.

(e) ANGIRÁ holds a place among the ten lords of created beings, and according to the *Bhāgavata* became father of UTATHYA and of VRIHASPATI in the reign of the second MANU.

(f) Brother of the seventh MANU and ruler of the world below.

(g) Regent of the planet Jupiter: has a place among legislators; he was son of ANGIRA according to one legend, but son of DEVALA according to another.

(h) Grandson of VASHISHTHA.

(i) Son of PARÁSHARA, and the reputed author of the *Purānas*.

(j) Heroic history notices two personages of the name of DAKSHA; one son of BRAHMÁ, the other son of PRACHETÁ: it does not appear certain which of them is the legislator.

(k) Son of the celebrated founder of a rational system of metaphysics and logic: he is named in every list of legislators: although texts are cited in the name of his father GOTAMA, the son of UTATHYA.

(l) The preceptor of the inferior gods, and one of the lords of created beings.

(m) The son of GARGA, the astronomer.

(n) Son of PRÁCHÍNA-VARHISHA and father of DAKSHA.

(o) One of the lords of created beings and father of KASHYAPA.

(p) Father of AGASTYA.

(q) Sons of MANU; the former is also called the son of BRAHMÁ.

(r) A sage among military men, who became a *Brāhmana* through his devotion.

(s) Son of VISHWÁMITRA, and grandfather of the celebrated grammarian PÁNINI, but, according to another legend, great-grandson of DAKSHA.

(t) Son of VIBHÁNDAKA.

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YANA, POITHÍNASI, JÁBÁLI, SUMANTU, PÁRASKARA, LOKÁKSHÍ and KUTHUMI.—*Rám-krishna*, in his gloss to the *Grijhya* or *Grihya-sútra* of PÁRASHARA, mentions thirty-nine, of whom nine are not to be found in any of the above lists. These (nine) are AGNI, CHYAVANA, CHHÁGALEYA, JÁTÚKARNA, PITÁMAHA, PRAJÁPATI, BUDDHA, SÁTYÁYANA, and SOMA.

Several *Sanhitás* are sometimes ascribed to one author: his greater or less institutes, (*vrihat* or *laghu*,) or a latter work of the author, when old (*vriddha*.)

There appear to have been some more legislators, namely, DHOUMYA, the priest of the *Pándavas* and author of a commentary on the *Jajurveda*, ASHWALÁYANA, who wrote on the details of religious acts and ceremonies, BHÁGURI, who is quoted as the author of a gloss on the institutes of MANU, and DATTA, the son of ATRI.

By PARÁSHARA, author of one of the *Sanhitás*, (referring to the Hindú division of the world into four ages,) are assigned, as appropriate to the *Krita-yuga*, or first age, the institutes of MANU, to the *Tretá* or second, the ordinances of GOUTAMA, to the *Dwápara*, or third, those of SANKHA and LIKHITA, and to the *Kali*, or fourth, (the present sinful age as it is deemed,) his (PARÁSHARA'S) own ordinances. That distinction, however, does not seem ever to have been actually observed.* The institutes of all and every one of the sages being respected as of equal authority next to those of MANU.

---

* In fact, had PARÁSHARA'S *Smriti* alone been adopted as the *Dharma Shástra* of the present age, it would not have been sufficient for the purpose; inasmuch as the *Vyavahára kánda* is entirely wanting in his institutes: so that a professed commentary on this *Smriti* (that will be hereafter noticed) is founded, in this respect, upon nothing belonging exclusively to PARÁSHARA, beyond a verse extracted from the *áchára* or the first *kánda*, purporting merely 'that the princes of the earth are in this age enjoined to conform to the dictates of justice.' *Vide* Str. H. L., Pref. pp. xii, xiii.

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The *Mánava Dharma Shástra,* or the *Sanhitá* of MANU, is above all of them: it is regarded by us Hindús as next in sanctity to our scriptures, the *Vedas,* and is the oldest of the memorial laws. The author of the *Manu-sanhitá* is that MANU, who is *Swáyambhuva* (sprung from the *Self-Existent.*) He is the grandson of BRAHMÁ and the first of the seven MANUS who governed the world. It was he who produced the holy sages and the rest, and was not only the oldest but also the greatest of the legislators.*

---

* This is manifest from the following verses of *Manu-sanhitá* (Ch. I.) "From that which is the first cause, not the object of sense, existing *everywhere in substance,* not existing *to our perception,* without beginning or end, was produced the divine male, famed in all worlds under the appellation of BRAHMÁ (11.) Having divided his own substance, the mighty power became half-male, half-female or *nature active and passive;* and from that female he produced VIRÁJ (23:) Know me, O most excellent of *Brâhmanas,* to be that person, whom the power VIRÁJ, having performed austere devotion, produced, by himself, me, the secondary framer of all this *visible world* (33). It was I, who, desirous of giving birth to a race of men, performed very difficult religious duties, and first produced the lords of created beings, eminent in holiness (34):—MARÍCHI, ATRI, ANGIRÁ, PULASTYA, PULAHA, KRATU, PRACHETÁ or DAKSHA, VASHISHTHA, BHRIGU, and NÁRADA (35). They abundant in glory, produced seven other MANUS, together with deities and the mansions of deities, and MAHARSHIS, or great sages, unlimited in power (36). He (BRAHMÁ) having enacted this code of laws, himself taught it fully to me in the beginning: afterwards I, taught it to MARÍCHI and nine other holy sages (58). This my son BHRIGU will repeat the divine code to you without omission; for that sage learned from me to recite the whole of it (59.) BHRIGU, great and wise, having thus been appointed by MANU to promulgate his laws, addressed all the *Rishis* with an affectionate mind, saying: 'Hear! (60): From this MANU, named *Swâyambhuva,* or *sprung from the Self-existent,* came six descendants, other MANUS, *or perfectly understanding the scripture,* each giving birth to a race of his own, all exalted in dignity, eminent in power (61): SWÁROCHISHA, OUTTAMI, TÁMASA, ROIVATA likewise and CHÁKSHUSHA, beaming in glory, and VOIVASWATA, child of the sun (62). The seven MANUS, (who are to be followed by seven more) of whom SWÁYAMBHUVA is the chief, have produced and supported this world of moving and stationary beings each in his own *antara, or the period of his reign*' (63)."

"We cannot but remark that the word MENU (MANU) has no relation whatever to the moon, and that it was the seventh, not the first of that name, whom the *Brahmins* believe to have been preserved in an ark from the general deluge: him they call the child of the sun, to distinguish him from our legislator, but they assign to his brother *Yama* the office (which the Greeks were pleased to confer on *Minos*) of Judge in the shades below." Sir William Jone's Preface to MANU, p. x.

Dr. Max Muller, at the conclusion of his letter to Mr. Morley, says:—"It is evident that the author of the metrical code of law speaks of the old MANU as of a person different from himself, when he says (Ch. X, *v.* 63:) 'Not to kill, not to lie, not to steal, to keep the body clean and restrain the senses; this was the short law which MANU proclaimed amongst the four castes.'" Seeing MANU

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Besides the usual matters treated of in a code of laws, the *Laghu Sanhitá* of MANU, which comprises in all 2,685 *shlokas* or couplets, and is divided into twelve

spoken of in the third person, he conjectures that the author of the metrical code of *Mánava Dharma Shástra* was not the first of all the MANUS. It arises from his not bearing in mind that the laws of MANU were rehearsed to the *Rishis* by BHRIGU, who of course mentions MANU in the third person; consequently it was quite consistent that this sage, after imparting the dictum of MANU as in the verse cited, should say: "this was the law which MANU proclaimed amongst the four castes." Thus another MANU is not the author of the code speaking of the old MANU as a different person from himself, but it is BHRIGU who does so. Besides, it was an ordinary custom with the ancient sages to refer to themselves in the third person. And it will appear on reference to MANU Chapter I. verses 38, 57, 58, 59, and 60, above cited, that the first MANU, who is *Swáyambhuva* (sprung from *the Self-existent,*) learnt the law from BRAHMÁ and taught it to the ten holy sages including BHRIGU, who, appointed by MANU to promulgate his laws, repeated the divine code to the *Rishis.* It is moreover asserted in the preface to the *Sanhitá* of NÁRADA, a son of the *Swáyambhuva,* that the same MANU, having composed his code in a hundred thousand *shlokas* or couplets, arranged under twenty-four heads in a thousand chapters, delivered the work to NÁRADA, the sage among gods. Thus there can be no doubt that the author of the *(vrihat) Manu-sanhitá* was the first of all the MANUS; and it appears from the above verses that *Laghu Manu-sanhitá* which we see was taught to, and rehearsed by BHRIGU.

Various dates have been suggested by the European scholars who have endeavoured to ascertain the period of the composition of the code of MANU'S laws. Chezy and Deslongchampes, the latter of whom professes to have formed his opinion from an examination of the code itself, conceive that it was composed in the 13th century previous to the Christian era. Schlegel gives it as his decided and well considered opinion, '*quod multorum annorum meditatio me docuit,*' that the laws of MANU were promulgated in India at least as early as the seventh century before Alexander the Great, or about a thousand years before Christ. He places the *Rámáyana* of VÁLMÍKI at about the same date, and doubts which of them was the older. Elphinstone, who is inclined to attribute great antiquity to the institutes of MANU on the ground of difference between the laws and manners therein recorded and those of modern times, and from the proportion of the changes which took place before the invasion of Alexander the Great, infers that a considerable period had elapsed between the promulgation of the code and the latter epoch; and he fixes the probable date of MANU, to use his own words 'very loosely' somewhere about half way between Alexander (in the fourth century before Christ.) and the *Vedas* (in the fourteenth.) Professor Wilson thinks that the work of MANU, as we now possess it, is not of so ancient a date as the *Rámáyana*; and that it was most probably composed about the end of the third or commencement of the second century before Christ. Sir William Jones's inference, founded on a consideration of the style, is however opposed to the learned Professor's conclusion. Sir William says, and with reason too: "the Sanscrit of the three *Vedas,* that of the *Mánava Dharma Shástra,* and that of the *Puránas* (of which *Rámáyana* is one,) differ from each other in pretty exact proportion to the Latin of Numa, from whose laws entire sentences are preserved, that of Appius which we see in the fragments of the twelve tables, and that of Cicero or of Lucretius, where he has not affected an obsolete style: if the several changes, therefore, of the Sanscrit and Latin took place, as we may fairly assume, in times very nearly proportional, the *Vedas* must have been written about three hundred years before these institutes and about six hundred years before the *Puránas.*" He then remarks: "the dialect of MANU is even observed in many passages to resemble that of the *Vedas,* particularly in a

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chapters, comprehends a system of cosmogony, the doctrines of metaphysics, precepts regulating the conduct, rules for religious and ceremonial duties, pious obser-

departure from the more modern grammatical forms, whence it must at first view seem very probable that the laws now brought to light were considerable older than those of Solon or even of Lycurgus, although the promulgation of them before they were reduced to writing might have been coeval with the first monarchies established in Asia." Upon such and other grounds he fixes the date of the actual text at about the year 1280 before Christ. Thus these opinions as to the date of the institutes of MANU, being founded not on any historical or positive proof, but mere conjecture, are, as might have been expected, contradictory and quite inconclusive. Now if the sage NÁRADA be believed, he asserts in the preface to his law tract, that MANU, having composed the laws of BRAHMÁ in a hundred thousand *shlokas* or couplets, arranged under twenty-four heads in a thousand chapters, delivered the work to him (NÁRADA, the sage among gods,) who abridged it for the use of mankind in twelve thousand verses, and gave them to the son of BHRIGU named SU-MATI, who, for the greater ease of the human race, reduced them to four thousand. Hence it appears that the *Vrihat* (large) *Manu-sanhitá* was composed by MANU himself. The abridged metrical code of *Manu-sanhitá* in question appears also from the text of the very work to have been composed during MANU's time, (as will be known from the verses 58 59, and 60, already cited.) It remains to determine the epoch of MANU's existence. This in the absence of other evidence should be believed to be the same as stated in the *Manu-sanhitá* before us, that is, he flourished in the beginning of the world, being progenitor of the races, human and divine.—See Ch. I, *ve.* 11, 32, 33, 34, 35 and 36.

Sir William Jones, after saying 'we cannot but admit that Minos, Mneues, or Mneuis have only Greek terminations, but that the crude noun is composed of the same radical letters both in Greek and Sanscrit,' and leaving others to determine whether our *Menus* (or *Menu* in the nominative,) the son of BRAHMÁ, was the same personage with *Minos* the son of Jupiter and the legislator of the Cretans (who also is supposed to be the same with *Mneuis* spoken of as the first lawgiver receiving his laws from the chief Egyptian deity Hermes, and *Menes* the first king of the Egyptians) remarks: "*Dárashekoh* was persuaded, and *not without sound reason*, that the first MANU of the *Brahmanas* could be no other person than the progenitor of mankind, to whom Jews, Christians, and Musulmans unite in giving the name of *Adam*."

The learned writer further remarks:—"The name of MANU (like *Menes*, *mens* and *mind*,) is clearly derived from the root (*man* or) *men* to understand, and it signifies, as all the *Pandits* agree, 'intelligent,' particularly in the doctrines of the *Vedas* which the composer of our *Dharma Shástra* must have studied very dilligently, since great numbers of its texts changed only in a few syllables for the sake of the measure, are interspersed through the work. A spirit of sublime devotion, of benevolence to mankind, and of amiable tenderness to sentient creatures pervades the whole work; the style of it has a certain austere majesty that sounds like the language of legislation and extorts respectful awe; the sentiments of independence on all beings but God, and harsh admonitions even to kings, are truly noble; and the panegyrics on the *Gáyatrí*, the mother (as it is called) of the *Vedas*, prove the author to have adored (not the visible material sun, but) that divine incomparable greater light, (to use the words of the most venerable text of Indian Scripture,) which illumines all, delights all, from which all proceed, to which all must return, and which alone can eradicate (not our visual organs merely, but) our souls and our intellects."

Mr. Morley, the author of the Analytical Digest, who in his introduction to the Hindú law has cited the observations of the Sanscrit scholars of Europe, makes this concluding remark:—"Whatever may be the exact period at which

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vances, and expiation, and abstinence, moral maxims, regulations concerning things political, military and commercial, the doctrine of rewards and punishments after death, and the transmigration of souls together with the means of attaining eternal beatitude.

The other sages wrote *Sanhitás* on the same model, and they all cited MANU for authority, whose *Sanhitá* must therefore be fairly considered to be the basis of all the text-books on the system of Hindú jurisprudence. The law of MANU was so much revered even by the sages that no part of their codes was respected if it contradicted MANU. The sage VRIHASPATI, now supposed to preside over the planet Jupiter, says in his law tract, that 'MANU held the first rank among legislators, because he had expressed in his code the whole sense of the *Veda*; that no code was approved, which contradicted MANU; that other *Shástras* and treatises on grammar or logic retained splendour so long only as MANU, who taught the way to just wealth, to virtue, and to final happiness, was not seen in competition with them.' VYÁSA too, the son of PARÁSHARA before mentioned, has decided, that the *Veda* with its *Angas* or the six compositions deduced from it, the revealed system of medicine, the *Puránas* or sacred histories, and the code of MANU were four works of supreme authority, which ought never to be shaken by arguments merely human. Above all he is highly honored by name in the *Veda* itself where it is declared that what MANU pronounced was a medicine for the soul.

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the *Mánava Dharma Shástrá* was composed or collected, it is undoubtedly of very great antiquity, and is eminently worthy of the attention of the scholar, whether on account of its classical beauty; and proving as it does that, even at the remote epoch of its composition, the Hindús had attained to a high degree of civilization, or whether we regard it as held to be a divine revelation, and consequently the chief guide of moral and religious duties, by nearly of a hundred millions of beings."—Morley's Digest, Vol. I, Introd. p. cxcvii.

The other Sanscrit scholars too of Europe do not and cannot deny that the *Sanhitá* of MANU is the most ancient or the first work of law.

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The following is a concise description of the works of several of the other sages.

ATRI composed a remarkable law treatise in verse, which is extant.

VISHNU is the author of an excellent law treatise, which is for the most part in verse. HÁRÍTA wrote a treatise in prose. Metrical abridgments of both these works are also extant.

JÁGNAVALKYA appears, from the introduction to his own institutes, to have delivered his precepts to an audience of ancient philosophers assembled in the province of *Mithilá*. The institutes of JÁGNAVALKYA are second in importance to MANU, and have been arranged in three books: viz., *áchára*, *vyavahára* and *práyashchitta kándas*, containing one thousand and twenty-three couplets.*

USHANÁ (crude form USHANAS) composed his institutes in verse, and there is an abridgment of the same.

ANGIRÁ (crude form ANGIRAS) wrote a short treatise containing about seventy couplets.

YAMA or JAMA composed a short tract containing a hundred couplets.

ÁPASTAMBA was the author of a law tract in prose, which is extant as well as an abridgment of it in verse.

The metrical abridgment only of the institutes of *Samvarta* is found in this country.

* The age of this code cannot be fixed with any certainty, but it is of considerable antiquity, as indeed is proved by passages from it being found on inscriptions in every part of India, dated in the tenth and eleventh centuries after Christ. "To have been so widely diffused," says Professor Wilson, "and to have then attained a general character as an authority, a considerable time must have elapsed; and the work must date, therefore, long prior to those inscriptions." In addition to this, passages from JAGNAVALKYA are found in the *Pancha-tantra*, which will throw the date of the composition of his work at least as far back as the fifth century, and it is probable even that it may have originated at a much more remote period. It seems, however, that it is not earlier than the second century of the Christian era, since Professor Wilson supposes the name of a certain *Muni*, *Nanaka*, which name is found in JAGNAVALKYA's institutes, originated about that time.—Morley's Introduction to the Hindú Law, pp. 11, 12.

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KÁTYÁYANA is the author of a clear and full treatise on law and also wrote on grammar and other subjects.

An abridgment of the institutes, if not the code at large, of VRIHASPATI, is extant.

The treatise of PARÁSHARA, which consists of the *áchára* and *práyaschitta kándas*, is extant.

VYÁSA is the reputed author of the *Purânas:* he is also the author of some works more immediately connected with the law.

SHANKHA and LIKHITA are the joint authors of a work in prose, which has been abridged in verse: their separate tracts in verse are also extant.

DAKSHA composed a law treatise in verse.

GOUTAMA is the author of an elegant treatise, although texts are cited in the name of his father GOTAMA, the son of UTATHYA.

SÁTÁTAPA is the author of a treatise on penance and expiation, of which an abridgment in verse is extant.

VASHISHTHA is the last of twenty legislators named by JÁGNAVALKYA: his elegant work in prose is intermixed with verse.

Besides the *Sanhitá* above mentioned, there is extant a part of NÁRADA's *Sanhitá;* and some texts of the other sages, except *Kuthumi*, *Buddha*, *Shátáyana*, and a few more (whose *Vachanas* and names rarely occur in any compilation) are seen cited in the Digests and Commentaries.*

The works of the sages do not treat of every subject as the institutes of MANU do; and it is the opinion

* Professor Stenzler enumerates forty-six legislators, who are the same as mentioned in the lists of JÁGNAVALKYA, PARÁSHARA, *Padma-purâna*, and *Rám-krishna*, already given; and he considers them all to be extant, having himself met with quotations from all, except *Agni*, *Kuthumi*, *Buddha*, *Shátáyana* and *Soma*.

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of *Pandits* that the entire work of none of the sages, with the exception of MANU, has come down to the present times.

There are glosses and commentaries on some of the principal institutes, which last, but for them, would have been very imperfectly understood, nay some parts thereof would have been given up as unmeaning or obsolete. Various glosses on the institutes of MANU are said to have been written by the *munis* or old philosophers, whose treatises were esteemed as next to the institutes themselves. These, except that of BHÁGURI, do not appear to be extant. Among the modern commentaries that by *Medhátithi*, son of *Víra-swámí Bhatta*, which having been partly lost has been completed by other hands at the Court of *Madana-pála*, a prince of *Digh*, that by *Gobinda-rája*, and that by *Dharaní-dhara* were in great repute until the appearance of *Kullúka Bhatta's* commentary, which has preference over the other glosses, being considered by the *Pandits* to be the shortest and yet the clearest and most useful.* The glosses of MANU denominated the *Mádhaví* by *Sháyanáchárjya* and the *Nanda-rája-krit* by *Nanda-rája* appear to be known among the Marhattas, and the former to be of general authority especially in the Carnatic. The commentary denominated *Manwartha-chandriká* appears also to be a work of celebrity.† Another commentary on MANU called the *Káma-dhenu* appears to exist, which is cited by *Srí-dharácharjya* in his *Smriti-sára.*

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* "At length appeared, (says Sir William Jones,) *Kullúka Bhatta*, a *Bráhmana* of Bengal, who, after a painful course of study and the collation of numerous manuscripts, produced a work, of which it may, perhaps, be said very truly, that it is the shortest yet the most luminous, the least ostentatious yet the most learned, the deepest yet the most agreeable commentary ever composed on any author, ancient or modern, European or Asiatic."

† This work was used by Monsieur Deslongchamps in the preparation of his edition of the institutes of MANU, and in his opinion it is in many instances more precise and clear than the gloss of *Kullúka Bhatta*.

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An excellent commentary on the institutes of VISHNU, entitled the *Voijayanti* was written by *Nanda Pandita*, who is also the author of a commentary on the institutes of PARÁSHARA.

The copious gloss of *Aparárka* of the royal house of Silára is supposed to be the most ancient commentary on JÁGNAVALKYA, and accordingly earlier than the more celebrated commentary on the institutes of that sage,—*Mitákshará* of *Vigyáneshwara*. A commentary on JÁGNAVALKYA was also written by *Deva-bodha*, and the one written by *Biswa-rúpa* is often cited in the Digests.

The *Dípa-kalikâ* by *Shúla-páni*, which is likewise a commentary on JÁGNAVALKYA, is in deserved repute with the Bengal school.*

The *Mitákshará* of *Vigyáneshwara* or *Vigyána Jogi*, a celebrated ascetic, although professedly a commentary on the institutes of JÁGNAVALKYA, is in fact a general and excellent digest. By citing the other legislators and writers as authority for his explanation of JÁGNAVALKYA'S text which he professes to illustrate, and expounding their texts in the progress of his work, and at the same time reconciling the seeming discrepancies, if any, between them, and the text of his author, *Vigyáneshwara* has surpassed all those writers of commentaries whose works combine the utility of regular digests with their original character as commentaries.

Kullúka Bhatta, the celebrated author of the commentary on the *Mánava-dharma-shástra*, wrote also a gloss on the text of *Jama* or *Yama*, brother of the 7th MANU.

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* *Shúla-páni* was a native of *Mithilá*, he resided at *Sahuria* in Bengal, and wrote also a treatise on penance and expiation, which is in great repute with both schools. Coleb. Dig. Pref. p. xviii.

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The text book of GOUTAMA was commented upon by *Hara-dattáchárjya.**

The *Varadá-rájya*, by *Varadá Rája*, is a general Digest, but it may be placed among the commentaries, since it is principally framed on the institutes of NÁRADA. It is a work of authority in the southern schools and especially in the *Drávira* country.

The *Mádhavíya* or *Mádhavya*, though a commentary on the *áchára* and *práyaschitta kándas* of the institutes of PARÁSHARA, is in fact an excellent digest and is of great authority in the southern part of India.†

There is a general and concise commentary and abridgment of the *Smritis*, which is entitled the *Chatur-vingshati smriti vyákhyá.*

The doctrines of the legislators do not agree in all respects; náy, on certain points they differ even from those of MANU himself; but it is not optional with us to reject any of them, for MANU enjoins: "when there are two sacred texts apparently inconsistent, both are held to be law; for both are pronounced by the wise to be valid and reconcilable." Under such circumstances a reconciliation of the contradictions and discrepancies was

* This commentator was a resident of *Drávira*, and is famous for his other compositions: his work, in which he occasionally quotes other *Smritis*, is called *Mitákshará*, and must not be confounded with *Vigyáneshwara's* treatise of the same name.

† This work was composed by *Vidyáranya Swámí*, the eminently learned minister of the founder of *Vidyá-nagara*, who, living in the fourteenth century, may be considered to have been, as it were, the lawgiver of the last Hindú dynasty. Of the first and third *kándas* of this celebrated work, to which the author gave the name of his brother *Mádhavächárjya*, the basis is the text of PARÁSHARA; but, as has been already explained, having, for the second, nothing of that *Smriti* to proceed upon, it became in fact, though not in name, a general digest of all the legal authorities prevalent at the time in the southern part of India. However this may detract in some degree from its value as being founded in truth upon no particular text, the general fame of the author is so great, resting as it does, not upon this work alone, but upon others also, particularly on his commentary upon the *Vedas;* that among his more ardent admirers he is held to have been an incarnation of *Shiva*. Str. H. L. Pref. pp. xv, xvi.

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the only remedy left. Hence arose the necessity of a complete digest, which, after harmonising the conflicting authorities, might lay down the rules to be followed in practice.

Several digests have for that purpose been composed by lawyers of different parts of India. And since the use of digests, the institutes of the sages are not regarded as themselves of final authority, which is to be sought in the conclusions and decisions of the authors of the several digests and the commentaries partaking of the nature of digests, with reference, however, to the schools to which they respectively belong*, (and which will be presently noticed.) Even the institutes of MANU, the foundation of the body of Hindú law, are in modern times looked upon as a work to be respected rather than to be implicitly followed.

The digests in general contain texts taken from the *sanhitás*, with occasionally comments thereupon and passages reconciling their apparent contradictions in fulfilment of the precept of the great lawgiver, MANU. They, moreover, contain frequent citations from other digests for the purpose of correcting or confuting their decisions or corroborating their own. Occasionally texts of the *Sruti* or *Vedas* and *Puránas* are quoted as authority. The *Sruti* is respected as the highest authority, and the *Puránas* as next to the *Smriti*, which itself is next to the *Sruti*. In forming their opinions and giving decisions the authors of the digests often have had recourse to the following general maxims and texts: "A principle of law established in one instance should be extended to other cases also, pro-

* And opinions on points of law as current in a particular school are given by the *pandits* or lawyers either in the language of the author of a local digest (if suited for the purpose,) or in their own, which harmonises the expositions of one of the local digests implicitly followed as authority, and, in either case, texts of sages, if there be any, corroborative of those opinions and expositions.

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vided there be no impediment." "Between rules general and special, the special is to prevail." "If there be a contradiction between a *Sruti* and a *Smriti*, the former is to be followed in preference to the latter; but if there be no such contradiction, the *Smriti* should be acted upon by the virtuous just as the *Vedas*" (JÁBÁLI.) "Should there be a contradiction between a *Sruti* and a *Smriti*, the former must be followed without consideration of any matter" (*Bhabishya Purána.*) "Wherever contradictions exist between *Sruti*, *Smriti* and *Purána*, there the *Sruti* is preferable; but where a contradiction exists between a *Smriti* and a *Purána*, there the *Smriti* is to be held in preference" (VYÁSA.) "If two texts (of *Rishis*) differ, reason (or that which it best supports) must in practice prevail (JÁGNAVALKYA.)

The various digests have not, however, treated of all parts of the *Dharma-shástra*, nor have they arrived at the same conclusion. The variations in the doctrines of the digests have led to the formation of the different schools. The digests, with reference to the discrepancies existing among them, may be said to be of five classes, each of which has been adopted as authority in some particular part of India, and thus have been formed the five schools or divisions of Hindú law. These schools are—the *Gouríya* (Bengal,) the Benares, the *Mithilá* (North Behar,) the *Mahárashtra* (the Marhatta country,) and the *Drávira*.* The original *Smritis* are of course common to all of them, but they have each given the preference to the doctrines inculcated in particular digests; and the texts of the sages must be used in the same sense as propounded in the particular digests adopted in each of the schools. Of

* The *Drávira* school is that of the whole of the southern portion of the Peninsula of India. It is termed by Sir William Macnaghten 'the school of Dekhan,' which is a curruption of the Sanscrit word '*dakshina*' (south.)

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these five schools two may be said to be the principal,—the Benares and Bengal: the other three being in most respects assimilated to the Benares school.

The *Mitákshará* of *Vigyáneshwara* is the chief guide of the Benares school. "The range of its authority," says Mr. Colebrooke, "is far greater than that of any of the other digests; for it is received in all the schools of Hindú law from Benares to the southern extremity of the Peninsula of India, as the chief ground-work of the doctrines which they follow, and as an authority from which they rarely dissent." The law books used in the different provinces, except Bengal, agree in generally referring to the authority of the *Mitákshará*, in frequently appealing to its texts, and in rarely, and at the same time modestly, dissenting from its doctrines on particular questions. That dissent consists in inculcating certain doctrines not contained in, nor sanctioned by, the *Mitákshará;* and the adoption of some of these doctrines and the use of the books inculcating such doctrines distinguish each of the minor schools from that of Benares. The other works which concurrently with the *Mitákshará* are preferentially respected in the province of Benares are the *Víramitrodaya* by *Mitra Misra*, the *Parashuráma-mádhava*, the *Vyavahára-mádhava*, the commentaries on the *Mitákshará* by *Víreshwara Bhatta* and *Bálam Bhatta*, the *Nirnaya-sindu*, and the *Vivada-tándava* and other works of *Kamalá-kara*.

The leading authorities of *Mithilá* are the *Vivàda-ratnákara**, and *Vivada-chintámani*†. The *Vivada-*

* *Vivada-ratnákara* was compiled under the superintendence of *Chandeshwara*, the minister of *Hara Sinha Deva*, king of Mithila. *Chandeshwara* himself is also the reputed author of some law tracts. The *Vyavahára-ratnákara*, compiled under the superintendence of the same minister, is also of great authority in *Mithilá*.

† This work was composed by *Báchaspati Misra*, who was also the author of several other works, namely, the *Vyavahára-chintámani*, *&c.* commonly cited by

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chandra by *Lakshmí* or *Lakshimá Devi* is likewise much respected in that school*. The works which concurrently with the above are of great weight in *Mithilá* are the treatise on inheritance by *Srikaráchárjya*, the *Madana-párijáta*†, the *Smriti-sára* or at full length *Smrityartha-sára* by *Srídharáchárjya*, the *Smriti-sára* or *Smriti-samuchchaya* by *Harináthopádhyáya*, and the *Dwoita-parishishta* by *Keshava Misra*. In the Marhatta school (or in the province of Bombay) preference is given to the *Vyavahára-mayúkha* of *Nila-kantha*,‡ the *Nirnaya-sindhu*§, the *Hemádri*¶, the *Vyavahára-koustubha* and *Parashu-rámamádhava*. The works of paramount authority in the *Drávira* school (that is in the territories dependant on the

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the name of *Misra*: these also are of great authority in Mithila. Mr. Colebrooke says:—'No more than ten or twelve generations have passed since he flourished at Semoul in Tirhoot.'—Coleb. Dig., Pref., p. xv.

* This learned lady set the name of her nephew *Misaru Misra* to all her compositions on law and philosophy, and took the titles of her works from the then reigning prince *Chandra Sinha*, grandson of *Hara Sinha Deva*.—*Ibid.*, Pref., pp. 15 & 16.

† This treatise was composed by *Víreshwara Bhatta*, and is named in honor of *Madana-pála*, a prince of the Jat race, who reigned at *Káshtha-nagara* or *Digh*, and who is apparently the same who gives title to the *Madana-vinoda*, dated in the 15th century of the Sambat Era (Coleb. Dig, Pref. p. xvii, & *Dá. bhá.* Pref. p. xi.) Sir William Macnaghten calls the author '*Madanopádhyáya*.' This work chiefly treats of *áchára* and *vyavahára-kánda* and also prevails in the Marhatta country.

‡ This is the sixth of the twelve treatises by the same author all bearing the same title *Mayúkha*, and the whole is designated collectively the '*Bhagavat-bháskara*.' The other eleven treatises of this author treat of religious duties, rules of conduct, expiation, &c.

§ By *Kamalákara Bhatta Káshikara*. It was written 246 years ago. It treats principally of *áchára* and *Práyaschitta*, touching incidentally only on questions of a legal nature. This work is of considerable authority at Benares, as well as amongst the Marhattas.

¶ By *Hemádri Bhatta Káshikara*. This is a work of antiquity: it contains twelve divisions and treats of all subjects, and is respected in many of the schools. *Vopa-deva*, author of the celebrated Grammar '*Mugdha-bodha*,' is also said to be the author of this great work (*Hemádri.*)

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Government of Madras) are the *Mádhavíya*, the *Smriti-chandriká** and the *Saraswatí-vilása*.†

These are the law tracts specially followed by the last three schools on account of their adopting certain doctrines that are inculcated by those books but have no place in the *Mitákshará*, which in all other points is respected as the main authority of all those schools of law. In *Urissa* too, which is now connected with the province of Bengal, the *Mitákshará* is of paramount authority, together with which are received there the works of *Shambho-kara Bájpeí* and *Udaya-kara Bájpeí*. Bengal Proper has alone taken for its chief guide in matters of inheritance‡ the *Dáya-bhága* of JÍMÚTA-VÁHANA, which is on almost every disputed point opposite to the *Mitákshará*: its authority is supreme. This celebrated treatise forms a part of his digest termed *Dharma-ratna*. JÍMÚTA-VÁHANA, therefore, may be styled the founder of the Bengal school.§

* By *Devánanda Bhatta*. "This excellent treatise on judicature is of great and paramount authority, as I am informed, in the countries occupied by the Hindú nations of *Drávira*, *Toilanga*, and *Carnáta*, inhabiting the greatest part of the Peninsula or *Dekhin*." Note by Colebrooke to his preface to the *Dáya-bhága*, p. iv.

† This is a general digest attributed to *Pratápa-rudra Deva Mahárája*, one of the princes of the *Kákatya* family, who established themselves to the north of the KRISHNÁ where they fixed their seat of government, which, extending itself by conquest, became the second empire to the southward. The second comprehends, as it does, the territories now belonging to Hyderabad, the Northern Circars, a considerable portion of the Carnatic, and, generally speaking, the whole of the countries, of which the *Toilanga* is at present the spoken language. This work, probably composed by his direction, became the standard law book of his dominions.—See Str. H. L., pref. pp. xvi, xvii.

‡ It is indeed in this branch of the law that one would find a great difference in doctrine.

§ JÍMÚTA-VÁHANA is said to have reigned on the throne of *Shāli-váhana*. He is probably the same with *Jímúta-ketu*, a prince of the race of *Silára* who reigned at *Tagara*; and he is mentioned in an ancient and authentic inscription found at Salset. (*Vide* Asiatic Researches, Vol. i. pp. 357 & 361.)

"It was an obvious conjecture that the name of this prince had been fixed to a treatise of law composed perhaps under his patronage and by his directions. That however is not the opinion of the learned in Bengal, who are more inclined to suppose, that the author really bore the name which is affixed to his work, and was a professed lawyer who performed the functions of judge and legal adviser to one of the most celebrated of the Hindú sovereigns of Bengal. No evidence, however, has been adduced in support of this opinion; and the period when this author flourished is therefore entirely uncertain." Coleb. *Dā-bhā*, pref. pp. xi, xii.

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The arguments by which he establishes his own opinions are treated with great ability; quotations from his work, or references to it, have been made by all the authors of the law tracts current in Bengal. The other works of great authority in Bengal are the *Dáya-tattwa*, the *Subodhiní*, which is a commentary on the *Dáya-bhága* by SRÍ-KRISHNA TARKÁLANKARA, and the *Dáya-krama-sangraha*.*

The *Dáya-tattwa* is that portion of *Raghu-nandana's Smriti-tattwa*† which treats of inheritance. It is a short and concise composition of the law, in which JÍMÚTA-VÁHANA's doctrines are in general strictly followed, but commonly delivered in his own words, or in brief extracts

* Sir William Macnaghten adds to the above number the compilations termed *Vyavasthárnava*, the *Vivádárnava*, or *Vivadárnava-setu* and the *Vivádabhangárnava*. The first of these has not been translated nor does it appear to be used by the *Pandits*. The second was disapproved of by Sir William Jones, and is seldom made use of by the *Pandits*, the translation of it too was considered by that learned Judge as having no authority. (See his letter hereafter inserted.) The third, namely, the *Vivāda-bhangárnava*, the translation whereof is known by the name of 'Colebrooke's Digest,' is a general digest, which cites texts of most of the sages and passages from the works of all the schools, and comments thereupon. It is therefore a work not only for the Bengal school but also for the other schools, and has been actually used as such by Sir Thomas Strange, and Mr. Colebrooke, and also by the *Pandits* of the different schools, as will be found on reference to the two Volumes of Strange's Elements of Hindu law, and the second Volume of Macnaghten's Principles of Hindú law.

† The *Smriti-tattwa* of RAGHU-NANDANA, who is commonly called *Smárta Bhattāchárjya*, is the greatest authority as regards the *áchára* and *prāyaschitta kándas* of the *Dharma-shástra* in the province of Bengal, and is a complete digest of those two *kāndas*. It comprises twenty-seven *tattwas* (books,) twenty-four of which respect the *áchára* and *prāyaschitta kándas*, and three books treat of three of the eighteen branches of the *vyavahāra kánda:* viz. the *Dáya-tattwa* which is on inheritance, the *vyavahāra-tattwa* which is on jurisprudence, and the *Divya-tattwa* which treats of ordeals. Sir William Jones says: "his digest approaches nearly in merit and in method to the digest of Justinian." *Raghu-nandana* flourished in the 16th century, for he was pupil of *Vásu-deva Sárvabhouma*, and studied at the same time with three other disciples of the same preceptor, who likewise have acquired great celebrity; *viz. Shiromani. Krishnānanda* and *Choitanya:* the latter is the well known founder of the religious order and sect of the *voishnavas*, and the date of his birth being held memorable by his followers, it is, as ascertained by his horoscope, said to be still preserved, as well as by the express mention of the date of his works to have been 1411 of the *Shaka* Era answering to Y. C. 1489; consequently RAGHU-NANDANA being his contemporary must have flourished at the beginning of the 16th century. *Dā. bhā.*, pref. p. xii.

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from JÍMÚTA-VÁHANA'S text. On a few points, however, RAGHU-NANDANA differs from JÍMÚTA-VÁHANA, and in some instances supplies that author's deficiencies.

The *Dáya-krama-sangraha* is an original treatise by SRÍ-KRISHNA TARKÁLANKÁRA, and contains a good compendium of the law of inheritance according to JÍMÚTA-VÁHANA'S text, as expounded in his commentary.

The *Dáya-rahasya* or *Smriti-ratnávalí* of RÁMA-NÁTHA VIDYÁ-VÁCHASPATI obtains a considerable degree of authority in some of the districts of Bengal; it differs, however, in some material points from both JÍMÚTA-VÁHANA and RAGHU-NANDANA, and thus tends much to disturb the certainty of the law on some important questions of frequent occurrence.

The other treatises on inheritance, according to the doctrines received in Bengal, are the *Dáya-nirnaya* by *Srí-kara Bhattácharjya* and a few more, which are little else than epitomes of the works of RAGHU-NANDANA and JÍMÚTA-VÁHANA.

There are several commentaries on the *Dáya-bhága*. The earliest of these is that of SRÍ-NÁTH-ÁCHÁRJYA CHÚRÁ-MANI which, though frequently cited by SRÍ-KRISHNA to correct or confute opinions therein expressed, must be acknowledged as, in general, an excellent exposition of the text, and was a great authority before the appearance of SRÍ-KRISHNA'S commentary: even now it is respected as authority on points not contradicted by SRÍ-KRISHNA.

The next in order of time is the gloss of ACHYUTA CHAKRA-BARTTÍ (author likewise of a commentary on the *Shráddha-viveka*). It cites frequently the gloss of CHÚRÁ-MANI, and is itself with that of CHÚRÁ-MANI quoted by MAHESHWARA. This work is upon the whole an able interpretation of the text of JÍMÚTA-VÁHANA. The commen-

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tary by MAHESHWARA which is posterior to those of *Chúrámani* and *Achyuta* is probably anterior to SRÍ-KRISHNA'S commentary, or at least of nearly the same time; for they appear to have been almost contemporary, the former seemingly a little elder of the two.* They differ greatly in their expositions of the text, both as to the meaning and as to the manner of deducing the sense, but neither of them affords any indication of having seen the other's work. The gloss by *Maheshwara* is for the greater part an able interpretation of the text of JÍMÚTA-VÁHANA. "The commentary of SRÍ-KRISHNA TARKÁLANKÁRA (says Mr. Colebrooke, and very justly too,) is the most celebrated of the glosses of the text of the *Dáya-bhagá.* It is the work of a very acute logician, who interprets his author and reasons on his arguments with great accuracy and precision, and who always illustrates the text, generally confirms its positions, but not unfrequently modifies or amends them. Its authority has been long gaining ground in the schools of law throughout Bengal; and it has almost banished from them the other expositions of the *Dáya-bhága,*; being ranked, in general estimation, next after the treatise of JÍMÚTA-VÁHANA and of RAGHU-NANDANA."

Of the remaining commentaries one bears the name of RAGHU-NANDANA. It is indeed a poor production and strongly suspected of bearing a borrowed name; or if it be at all the work of the celebrated author of the *Smriti-tattwa,* it must be the earliest production of his pen. The commentary by RÁMA-BHADRA NYÁYÁLANKÁRA is not generally in use; and the commentary written by

* The great-grandsons of both these writers were living in 1806: and the grandson (daughter's son) of SRÍ-KRISHNA was alive in 1790. Both consequently must have lived in the first part of the last century.—Coleb. *Dá. bhá.*, pref. p. vii.

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KRISHNA-KÁNTA SHARMÁ of Nudea is neither complete nor in use. All these commentaries on the *Dáya-bhága* have of late been printed with the text by Baboo Prosunno Coomar Tagore.

RÁMA-NÁTHA VIDYÁ-VÁCHASPATI, the author of *Dáya-rahasya*, has also written a commentary on the *Dáya-bhága*.

KÁSHÍ-RÁMA has written a useful commentary on the *Dáya-tattwa* of RAGHU-NANDANA, which nearly agrees with the views taken by SRÍ-KRISHNA in his interpretation of the *Dáya-bhága*.

These are the five classes of law tracts, which are severally respected by the five schools or divisions.* It must not, however, be inferred that each of these classes of law tracts is respected solely by a particular school, and not at all by the other schools; the fact is, that each is of paramount or leading authority with a particular school, and at the same time is on general and uncontradicted

* Mr. Morley, however, in his recapitulation sub-divides the *Drávira* division into three, namely *Drávira*, *Karnátaka*, and *Andhrá*, and mentions the books preferentially used in each of the schools of Hindú law. They are as follows:—

I. Bengal School:—*Dharma-ratna* (i. e.,) *Dáya-bhága* and its commentaries by SRÍ-KRISHNA TARKÁLANKÁRA and SRÍNÁTHA A'CHÁRJYA-CHÚRÁ-MANI, *Dáya-krama-sangraha*, *Smriti-tattwa*, (its) *Dáya-tattwa*, *Vivádárnava-setu*, *Viváda-sárárnava* and *Viváda-bhangárnava*.

II. Mithilá School:—*Viváda-ratnákara*, *Viváda-chintámani*, *Mitákshará*, *Vyavahára-chintámani*, *Dwoita-parishishta*, *Viváda-chandra*, *Smriti-sára* or *Smriti-samuchchaya* and *Madana-párijáta*.

III. Benares School:—*Mitákshará*, *Víra-mitrodaya*, *Mádhavíya*, *Vivádatándava* and *Nirnaya-sindhu*.

IV. Maháráshtra School:—*Mayúkha*, *Mitákshará*, *Nirnaya-sindhu*, *Hemádri*, *Smriti-koustubha* and *Mádhavíya*.

V. Drávira School:—

Drávira Division:—*Mitákshará*, *Mádhavíya*, *Saraswatí-vilása* and *Varadárájya*.

Karnátaka Division:—*Mádhavíya*, *Mitákshará* and *Saraswatí-vilása*.

Andhra Division:—*Mitákshara*, *Mádhavíya*, *Smriti-Chandriká* and *Saraswatí-vilása*.

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points respected as authority in the other schools, though of course in subordination to that which is preferentially used by them severally. A class of law tracts, which is of paramount authority with one school, may also be regarded as of unquestionable authority in another school on points regarding which no rules are prescribed in the books preferentially used in that school.*

Of the treatises on adoption, the *Dattaka-mímánsá*† of *Nanda Pandita*, the author of the *Voijayantí* and the *Pratitákshará*, and the *Dattaka-chandriká*‡ by *Devánanda Bhatta*, the author of *Smriti-chandriká* (*ante*, p. xvii,) are the most esteemed: they are almost equally respected all over India, the law of adoption not exhibiting much conflict of doctrines between the several schools, although some difference of opinion may be observed

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* Thus in Strange's work on Hindú law, which is principally designed for the Marhatta and Drávira schools, works of paramount authority in Bengal have been cited on the general points and also on points not touched upon in the law tracts chiefly used in those schools. In the first of the above two cases, the Bengal authorities are regarded as secondary to, or corroborative of, the authorities of those schools, while in the second case, the authorities of the Bengal school must be regarded as also unquestionable authorities in the said schools by reason of having supplied the deficiency in the law tracts adopted by him. It will also be found from the second volume of Sir William Macnaghten's work on *Hindu* law, which is composed of precedents or admitted law opinions, that the *Pandits* have on general or uncontradicted points, indiscriminately cited the authorities of any school, though the cases in which they gave their opinions appertained to a particular province; and that in the cases of one country they have cited the authorities of another province or school whenever on points at issue they found no rules, prescriptive or prohibitory, in the law tracts of the former province or school.

† Mr. Sutherland concludes his remarks upon the *Dattaka-mímánsá* by saying that—"it is on the whole compiled with ability and minute attention to the subject, and seems not unworthy of the celebrity it has attained."

‡ The *Dattaka-chandriká* is a concise treatise on adoption and supposed to be the basis of *Nanda Pandita's* more elaborate work. Many of the *Pandits* of Bengal attribute this work to the late *Raghu-mani Vidyá-bhúshana*, spiritual adviser of the *Raja* of Nudea and a distinguished *Pandit* who flourished in the latter part of JAGAN-NÁTHA'S life, and is said to have assisted Mr. Colebrooke in the preparation of his translation of the *Dáya-bhága* and *Mitákshará*. One of the grounds of such attribution is, that by putting together consecutively the first letter of the first and third lines and the last letter of the second and fourth lines of the last verse of the book, the name '*Raghu-mani*' is formed.

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amongst the individual writers. It must be remarked, however, as an important distinction, that where they differ the doctrine of the *Dattaka-chandriká* is adhered to in Bengal and by the Southern jurists, while the *Dattaka-mímánsá* is held to be an infallible guide in the provinces of *Mithila* and *Benares*. In addition to these two treatises, there are the *Datta-mímánsá* by *Vidyáranya Swámí*, the *Datta-chandriká* by *Gangá-deva Bájpeí*, the *Datta-dípaka* by *Vyásáchárjya*, the *Dattaka-koustubha* by *Nágoji Bhatta*, the *Dattaka-bhá-shana* by *Krishna Misra*, the *Dattaka-tilaka* by *Bhava-deva Bhatta*, and the *Dattaka-siddhánta-manjarí* by *Ráma-krishna*, which are general digests of the law of adoption, but they appear to be rarely used or cited by the lawyers. There is another treatise on adoption called the *Dattaka-nirnaya*, which is a compilation of a celebrated *Pandit* of the name of *Srí-nátha Bhatta*. This work was translated by Mr. Blacquiere, but the translation has not been published.*

An excellent commentary on the *Dattaka-mímánsá* and *Dattaka-chandriká* has been recently written and published by *Bharat-chandra Shiromani*, a celebrated lawyer, and at present the professor of Hindu law in the Government Sanscrit College.

Besides the above, there exist several other digests and commentaries. These are the *Áchárjya-chandriká* by *Srí-náthácharjya*, son of *Srí-karácharjya*, both celebrated lawyers of the *Mithilá* school;—the *Vyavahára-kalá* of *Bhava-deva Bhatta*, also called *Bala-balabhí-bhujanga*, author of the rituals much consulted in Bengal;—the *Bráhmana-sarvaswa Nyáya-sarvaswa*, *Pandita-sarvaswa*,

* See Preface to the Considerations on *Hindu* Law, p. xiii.

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and the other treatises by *Haláyudha*,* which are chiefly cited in the Bengal digest;—the sublime works of *Udayanáchárjya*, the reviver of the rational system of philosophy;—the *Kalpa-taru* by *Lakshmí-dhara*, who also composed a treatise on the administration of justice by command of *Govinda-chandra*, a king of *Káshí*, sprung from the *Vástava* race of *Káyasthas*;—the *Govindárnava*, composed under the superintendence of the same prince by *Nara Sinha*, who was the son of *Ráma-chandra*, the grammarian and philosopher;—the *Parashu-ráma-pratápa*, a general digest composed by order of *Sabaji Pratápa*, *Raja* of the Eastern Telinga country, about five hundred years ago. The *Vyavahára-Swíkára* by *Nágoji Bhatta*; the *Madana-ratna* by *Madana Sinha*, an ancient work of notoriety treating of the *áchára*, *vyavahára*, and *práyashchitta*;—the *Áchárakа*, a work principally on *áchára* and *vyavahára* by *Shankara Bhatta Káshíkara*;—the *Dyota*, a general digest written more than a century ago by *Goga Bhatta Káshíkara*;—the *Dinakara-udyota*, a work on *áchára* and *vyavahára* by *Vishwa-rúpa Rámaka Goga Bhatta Káshí-kara*;—and *the Prithiví-chandrodaya* which also is a general digest. Most of these works are not now in use, but their texts are cited in many of the current digests and commentaries. The work of JITENDRIYA is cited in the *Mitáksharà*, *Dáya-bhága*, and other books. And the works of *Goi-chandra*, *Graheshwara*, *Dháreshwara*,† *Bala-rúpa*

* This great *Pandit* was the spiritual guide of *Lakshmana Sena*, a renowned monarch, who gave his name to an era of which upwards of seven hundred years have expired. *Haláyudha* was a descendant in the fifteenth degree of *Bhatta Náráyana*, author of the *Venísanhára* (a celebrated drama,) and one of the five vedantists who were brought from Kunouj by *Rájá A'disura*, and whose descendants are almost all the *Rárhi* and *Bárendra Bráhmins* of Bengal.

† *Dháreshwara* is said to be the same as *Rájá Bhoja*. *Vide* Coleb. Dig. pref. p. xi.

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Hari-hara, Murári Misra and many others are occasionally alluded to in the *Viváda-bhangárnava* and some other digests.

Since the establishment of the British empire in India three digests have been composed in Sanscrit. The first of these is the *Vivádárnava-setu*,* compiled at the request of Mr. Warren Hastings. This work was proposed as early as the 18th of March 1773, at the opening of the Court of *Sudder Dewanny Adawlut* in Bengal. In the following year a translation of the work was made by Mr. Halhed, and published under the title of "A Code of Gentu Laws." This work, however, was disapproved of, and its translation was condemned by, Sir William Jones for reasons† set forth in his letter to the Chief Government of India, in which he strongly recommended the enforcement of the *Hindú* law and the compilation of a better code. The sentiments expressed in that paper are truly worthy of him. "Nothing (he says) could be more obviously just than to determine private contests according to

* This work was compiled by several *Pandits*, of whom JAGAN-NÁTHA, author of the digest translated by Mr. Colebrooke, was one.

† "It (says the learned judge alluding to the work in question) by no means obviates the difficulties before stated, nor supersedes the necessity or the expedience at least of a more ample repository of Hindú laws, especially on the twelve different contracts to which *Ulpian* has given specific names, and on all the others, which, though not specifically named, are reducible to four general heads. The last mentioned work is entitled the '*Vivádárnava-setu*,' and consists, like the Roman digest, of authentic texts with the names of their several authors regularly prefixed to them, and explained where an explanation is requisite, in short notes taken from commentaries of high authority. It is, as far as it goes, a very excellent work; but though it appears extremely diffuse on subjects rather curious than useful, and though the chapter on inheritance be copious and exact, yet another important branch of jurisprudence, the law of contracts is very succinctly and superficially discussed, and bears an inconsiderable proportion to the rest of the work. But whatever be the merit of the original, the translation of it has no authority, and is of no other use than to suggest inquiries on the many dark passages which we find in it: properly speaking, indeed, we cannot call it a translation; for though Mr. Halhed performed his part with fidelity, yet the Persian interpreter had supplied him only with a loose, injudicious *epitomé* of the original Sanscrit, in which abstract many essential passages are omitted." Mr. Colebrooke, by quoting the above remark in the preface to the digest, and not making any observation upon it either in that book or in any of his works or opinions, seems to have acquiesced in the judgment pronounced upon it by Sir William Jones.

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those laws, which the parties themselves had ever considered as the rules of their conduct and engagements in civil life; nor could any thing be wiser than, by a *legislative Act,* to assure the *Hindu* and *Mussulman* subjects of Great Britain that the private laws, which they severally hold sacred, and a violation of which they would have thought the most grievous oppression, should not be superseded by a new system, of which they could have no knowledge, and which they must have considered as imposed on them by a spirit of rigour and intolerance.* So far the principle of decision between the native parties in a cause appears perfectly clear; but the difficulty lies (as in most other cases) in the application of the principle to practice; for the *Hindu* and *Mussulman* laws are locked up for the most part in two very difficult languages, Sanscrit and Arabic, which few Europeans will ever learn, because neither of them leads to any advantage in worldly pursuits; and if we give judgment only from the opinions of the native lawyers and scholars, we can never be sure that we have not been de-

* Again, at the conclusion of his preface to MANU, that eminent judge remarks: "Whatever opinion in short may be formed of MANU and his laws, in a country happily enlightened by sound philosophy and the only true revelation, it must be remembered that those laws are actually revered as the word of the most High by nations of great importance to the political and commercial interests of Europe, and particularly by many millions of Hindú subjects, whose well directed industry would add largely to the wealth of Britain, and who ask no more in return than protection for their persons and places of abode, justice in their temporal concerns, indulgence to the prejudices of their old religion, and the benefits of those laws which they have been taught to believe sacred, and which alone they can possibly comprehend."

Sir Francis Macnaghten too remarks: "The right of Hindús to have their contests decided *by their own laws* has been established by the legislature of Great Britain, and I most cordially concur in the sentiments which have been expressed by Sir William Jones upon this subject,"—"As to the *Hindus*, I have not a predilection for the tenets of any of their schools, or for the doctrines of any of their scholiasts in particular. Such as their law is, they have a right to an administration of it, among the parties themselves. To deprive them of this right against their will, or without their desire, would be rigorous in a civil, and intolerant in a religious, point of view; for their laws and their religion are so blended together that we cannot disturb the one without doing violence to the other. Their own is the only law to be administered to them." "Give them not any laws but their own; yet under a pretext of dealing those out, let us not subject the people to wrong."—Cons. H. L., pref., pp. V, VI.

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ceived by them. It would be absurd and unjust to pass an indiscriminate censure on a considerable body of men; but my experience justifies me in declaring that I could not, with an easy conscience, concur in a decision merely on a written opinion of native lawyers, in any cause in which they would have the remotest interest in misleading the court: nor, how vigilant soever we might be, would it be very difficult for them to mislead us, for a single obscure text, explained by themselves, might be quoted as express authority, though perhaps in the very book from which it was selected it might be differently explained, and introduced only for the purpose of being exploded. The obvious remedy for this evil had occured to me before I left England, where I had communicated my sentiments to some friends in Parliament, and on the Bench in Westminster Hall, of whose discernment I had the highest opinion; and those sentiments I propose to unfold in this letter with as much brevity as the magnitude of the subject will admit. If we had a complete digest of *Hindú* and *Mahomedan* laws, after the model of Justinian's inestimable Pandects, compiled by the most learned of the native lawyers with an accurate verbal translation of it into English; and if copies of the work were reposited in the proper offices of the Sudder Dewanny Adawlut and the Supreme Court, that they might occasionally be consulted as a standard of justice, we should rarely be at a loss for principles at least and rules of law applicable to the cases before us, and should never perhaps be led astray by the *Pandits* or *Moulavis*, who would hardly venture to impose on us when their imposition might be so easily detected. It would not be unworthy of a British Government to give the natives of these Indian provinces a permanent security for the due administration of justice among them, similar to that which Justinian gave to his

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Greek and Roman subjects; but our compilation would require far less labour and might be completed with far greater exactness in as short a time; since it would be confined to the laws of contracts and inheritances, which are of the most extensive use in private life, and to which the legislature has limited the decisions of the Supreme Court in causes between native parties." The letter from which this extract is taken, is dated 19th of March 1788.

On the same date, the then Governor-General, Marquis Cornwallis, with the concurrence of the Members of Council, accepted the offer in terms honorable to the proposer and expressive of the most liberal sentiments: "The object of your proposition (they say) being to promote due administration of justice, it becomes interesting to humanity; and it is deserving of our peculiar attention, as being intended to increase and secure the happiness of the numerous subjects of the Company's provinces." And the result of this proposition, so gladly accepted by the Governor-General in Council, was the composition of the *Viváda-sárárnava*, and the *Viváda-bhangárnava:* the former was written by *Sarvoru Trivedi*, a lawyer of *Mithila*, and the latter by JAGAN-NÁTHA TARKA-PANCHÁNANA, and both by the direction of Sir William Jones, who himself had undertaken a translation of the latter work together with an introductory discourse, for which he had prepared ample materials,* when the hand of death arrested his labours. Although it must be a matter of regret that the public has lost, by his premature death, a translation from his pen of a digest compiled under his direction, yet it must be acknowledged that the scholar selected by Sir John Shore, the succeeding Governor-

* See his last anniversary discourse as President of the Asiatic Society. Vol. IV, p. 176.

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General, for completing* a translation of this digest was one who seems to have devoted much more time and attention to the study of our literature and law, and than whom no one has as yet been able to make a more faithful and complete translation of a law tract in Sanscrit, or to give a better exposition of our law. The translation of the *Vivâda-bhangârṇava* or JAGAN-NÂTHA's Digest is commonly known as 'Colebrooke's Digest.' This digest treats in full of the topics of contracts and inheritance as required by Sir William Jones. The author of the work was one of the greatest *Pandits* and also one of the most ingenious logicians of the age. Instead of reconciling contradictions or making anomalies consistent, he has in many instances attempted to display his proficiency in logic and promptitude in subtle ingenuity, and has thus rendered the work an unsafe guide for a reader not already well versed in the law. Such reader will often find in it several discordant doctrines on one and the same point, and will be at a loss to know which to follow; and if he follow whatever doctrine he finds at the first sight, without knowing what doctrine is recorded on the same point at another page, he will perhaps do wrong, for there may be in another place of the same book another doctrine, perhaps the just one, and the former may have been founded only on subtle ingenuity. He will, moreover, see that in one place doubts are ingeniously thrown upon established doctrines and principles laid down by unquestionable authorities, and in another he will find a corroboration of the same doctrines and principles. He will very often find no decision on a point, but only the dis-

* Because the version of many texts cited in the work come from the pen of Sir William Jones, most of the laws quoted from MANU being found in his translation of the *Mânava-dharma Shâstra*, and other texts having been already translated by him when perusing the preceding digest, the *Vivâdârnava-setu.*—*Vide* Coleb. Dig., pref. p. xviii.

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cordant opinions of several authors of several schools. Under such circumstances, he only who knows the established doctrines of the different schools can safely make use of the work. It is for the above and other reasons that unfavourable opinions have been expressed by the European scholars who have written on the Hindú law.*

* The opinion of Mr. Henry Colebrooke is as follows:—"In the preface to the translation of the digest I hinted an opinion unfavourable to the arrangement of it, as it has been executed by the native compiler. I have been confirmed in that opinion of the compilation, since its publication; and indeed the author's method of discussing together the discordant opinions maintained by the lawyers of the several schools, without distinguishing in an intelligible manner which of them is the received doctrine of each school, but on the contrary leaving it uncertain whether any of the opinions stated by him do actually prevail, or which doctrine must now be considered to be in force and which obsolete, renders his work of little utility to persons conversant with law, and of still less service to those who are not versed in Indian jurisprudence; especially to the English reader, for whose use, through the medium of translation, the work was particularly intended."—Preface to the *Dáyabhága*, pp. ii, iii.

"It consists," says Sir Thomas Strange, "like the Roman Digest, of texts, collected from the works of authority extant in the Sanscrit language only, having the names of their several authors prefixed, together with an ample commentary by the compiler, founded for the most part upon the former ones. That its arrangement was not, on its first appearance, satisfactory to the learned, and that the commentary abounds with frivolous disquisitions, as well as with the discordant opinions of different schools, not always sufficiently distinguished, rests upon the best authority, that of the learned translator, by whom its utility, for the purpose for which it was planned, is well nigh disclaimed. It is long, therefore, since it was characterised, not unhappily, as 'the best law book for counsel and the worst for a judge.' But in whatever degree JAGANNÁTHA's Digest may have fallen in estimation, as a book to be used with advantage in our courts, and especially in those to the southward, it remains a mine of juridical learning, throwing light upon every question on which it treats, whatever attention it may require in extracting it."—Str. H. L., Vol. I, pp. xvii—xix.

The author of the Considerations on the Hindú Law remarks:—"The plan of Sir William Jones may have been excellent, but the execution of it fell to the share of JAGAN-NÁTHA. He has given us the contents of all books indiscriminately. That he should have reconciled contradictions or made anomalies consistent, was not to be expected; but we are often the worse for his sophistry, and seldom the better for his reasoning. His incessant attempts to display proficience in logic and promptitude in subtlety he might have spared, without regret to his readers."—Cons. H. L., p. viii.

The author of the Summary of the Laws and Customs of the Hindús remarks: "The digest of JAGAN-NÁTHA translated by Mr. Colebrooke, although other subjects are occasionally adverted to, is nominally confined to the law of contracts and successions; and the frequent occurrence of jarring texts and obscure commentaries forms a great objection to it as a work of particular reference."—*Ibid*, Pref. p. v.

I concur, however, with Mr. Morley in the opinion that—"Notwithstanding the unfavourable opinions of the *Vivàda-bhangârnava*, pronounced by its learned translator and others, there is no doubt but that it contains an immense mass

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The *Vivâda-bhangârnava*, citing, and commenting on, the texts of the works adopted in the several schools, is occasionally used as an authority by the lawyers of the other schools.*

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of most valuable information, more especially on the law of contracts, and will be found eminently useful by those who will take the trouble of familiarising themselves with the author's style and method of arrangement." The accuracy of the learned translator's remarks, that for the reasons noticed by him the work is of little utility, (even) *to persons conversant with the law*, may be questioned. Persons conversant with the Hindú laws as current in the different schools, seeing an opinion with the name of its author, may recollect or discover to what school he belongs; nor can it be difficult for them to know whether that opinion prevails in any school or is become obsolete. At any rate, they will find in the book almost all the important texts of almost all the ancient and modern works, with comments or expositions so numerous, curious, and interesting, that no work in existence can impart half the information or knowledge which JAGAN-NÁTHA's Digest does. And possessed of this immense mass of opinions and informations, they can easily select those justly referrible to each of the schools. Those conversant with the doctrines of the Hindú laws as current in the different schools cannot, therefore, fail to derive very great benefit from this work. Sir Thomas Strange and Sir William Macnaghten, whose works abound with references to quotations from the digest, and many of whose principles are founded thereupon, are striking proofs of the usefulness of the work in this respect. The learned translator, too, has written several of his remarks and opinions on the authority of that digest. It is only difficult, as already remarked, for a person not conversant with the law, to derive benefit from it; and, in fact, to them it would be an unsafe guide.

* Mr. Colebrooke, however, in his letter to Sir Thomas Strange says:—"We have not here the same veneration for him when he speaks in his own name, or steps beyond the strict limits of a compiler's duty; and as his doctrines, which are commonly taken from the Bengal school, or sometimes originate with himself, differ very frequently from the authorities which heretofore prevailed in the South of India, I am sorry that the Southern *Pandits* should have been thus furnished with means of adopting, in their answers, whatever doctrine may happen to be best accommodated to the bias they may have contracted; and I should regret that JAGAN-NÁTHA's authority should supersede that of the much abler authors of the *Mitáksharâ*, *Smriti-chandrikâ*, and *Mádhavîya*." With due deference to that eminent scholar, it may be remarked that if the Southern *Pandits* used an opinion originating with JAGAN-NÁTHA himself and not founded upon, or consistent with, an unquestionable authority, notwithstanding the *Mitákshará* and the other authorities expressed a different doctrine on the same point, then their opinion would indeed be objectionable; but if they cited a passage from JAGAN-NÁTHA's Digest because they did not find a law on the same point in the books preferably used in their schools, or because they found in JAGAN-NÁTHA's Digest an exposition better worded, and not contradicted by the local authorities, the learned gentleman ought not to have been sorry for it; inasmuch as he himself has done the same in many of his remarks, on the opinions of the Southern *Pandits*, published in the second volume of Strange's work on the Hindú Law. Sir William Macnaghten, too, though he in one place considers the *Vivâda-bhangârnava* as a Bengal authority, has founded many of his general principles upon the texts contained in the said digest. Open also the second volume of his work on Hindú Law, and it will be found that many *vyavasthâs* relative to cases of the other provinces have been founded by the *Pandits* on the authority of JAGAN-NÁTHA's Digest, and these *vyavasthâs* of theirs have been approved of, and published by, the learned gentleman himself as correct and accurate. Besides, where JAGAN-NÁTHA, citing the

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Some other law tracts also have been translated into English, the most important of which are the *Dáya-bhága* of JÍMÚTA-VÁHANA and the *Mitákshará* of *Vigyáneshwara*, the standard authorities of Hindú Law of inheritance in the schools of Bengal and Benares respectively. They were translated by Mr. Henry Colebrooke with accuracy and fidelity. The learned translator having accompanied them with elucidatory annotations and glosses drawn from their commentaries and numerous other sources, to which his peculiar opportunities and immense erudition gave him ready access, has rendered those translations of very great utility; every page bears testimony to his diligence in collecting the materials, to his judgment in their selection, and to his learning in their interpretation. A considerable knowledge is sure to be derived from the study of these two works in which the entire doctrine of the two schools, with the reasons and arguments by which each is supported, may be seen at one view in a condensed form. Mr. Orianne has also translated the chapter on inheritance from the *Mitákshará*. Mr. Borradaile, a Judge of the Sudder Dewanny Adawlut of Bombay, and the author of the valuable Reports, has published a translation of the *Vyavahára-mayúkha*, to which he has affixed annotations, referring the passages of other works on Hindú Law, and rendering his version of peculiar utility to the student of the law of that side of India. A translation of the *Dáya-krama-sangraha* has been published by

authorities of one school, draws a conclusion not inconsistent with its doctrines, or where he gives an exposition as being the doctrine of a certain school, and that exposition is not contradicted by the authorities thereof, or where his work contains an exposition not to be found in, or not prohibited by, any of the law tracts current in that school, there is no reason why that part of his work should not be used by lawyers as an authority in that school. Had the case been otherwise, Sir Thomas Strange, whose work on Hindú Law is chiefly intended for the Southern schools of India, would not have cited as authorities JAGAN-NÁTHA and other authors of Bengal in almost every page of his work; and Sir W. Macnaghten, too, would not have founded his chapter on contracts which is for all the schools almost solely upon JAGAN-NÁTHA'S Digest.

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Mr. Wynch, who has judiciously adopted the version of the texts of the legislators and sages of antiquity, cited therein from the works of Sir William Jones and Mr. Henry Colebrooke. The institutes of MANU have been translated by Sir William Jones and Sir Graves Haughton into English, and by Monsieur Loiseleur Deslongchamps into French. The version by Jones has been generally considered as the masterpiece of that learned and elegant writer; those by Haughton and Deslongchamps vary from it but slightly and nowhere importantly. There is another translation by one or two natives of the first three books of MANU, published in pamphlets, in which the Sanscrit text is given in the *Deva-nágarí* character, a literal translation in Bengali, and Sir William Jones' translation, with a revised translation in English. The *Dattaka-mímánsá* and *Dattaka-chandriká* have been translated by Mr. Sutherland, with useful notes after the manner of his illustrious uncle, Mr. Colebrooke. His version of the two standard works on adoption and the synopsis thereof, which he has appended to his translation, are eminently useful. A French translation of the *Dattaka-chandriká* by Mr. Orianne has also been published.

A translation of the *Vyavahára-kánda* of JÁGNAVALKYA's institutes by Dr. Roer and F. Montriou, Esq., barrister, has just appeared. This work is entitled "Hindu Law and Judicature," and contains many explanatory and useful notes.

Besides the above mentioned translations we have some original works on Hindú law written in English. The chief of these are the "Considerations on Hindú Law," "Elements of Hindú Law," and the "Principles and Precedents of Hindú Law."

Sir Francis Macnaghten was the author of the Considerations on Hindú Law, which consists of enunciation

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of principles, seldom founded upon the authority of the law books, but generally collected from the then decided cases, such as ought in his judgment to be adopted, and such as ought if adopted, to continue immutable. Those cases, however, were decided for the most part according to the opinions of *Pandits*, who are spoken of by him in the most disparaging terms, and to whom he says he was obliged to have recourse on points as they arose. Those principles have been illustrated copiously by arguments; and the decided cases from which those principles have been deduced are repeated over and over, and given *in extenso*. His chapter on adoption is the longest of all, occupying 122 pages, 42 of which are devoted to a criticism of, and severe reprehension on, a judgment of Sir Thomas Strange in a particular case. The seventh chapter of the work in question is on contracts, and is composed only of such texts as are set forth in Colebrooke's translation of the Digest of JAGAN-NÁTHA; and the eighth and ninth chapters are for the most part translations from the *Mitákshará*. The Addendum and Appendix respect only the law of adoption. It is apparent from his writings that he had not the slightest knowledge of the Sanscrit language, nor of the law books not translated into English. His work, however, is more useful than could be expected from an author who was possessed of such insufficient means, and who, moreover, commenced and finished it in one year.*

The Elements of Hindú Law was written by Sir Thomas Strange when Chief Justice of the Supreme Court of Madras. Although he had no knowledge of the Sanscrit language, yet almost every one of the elements con-

* "It is to be regretted," says Mr. Morley, "that the whole work is pervaded by a spirit of exaggerated self-estimation and unjust depreciation of everything not consonant with the author's professional prejudices."

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tained in his work is based upon good and appropriate authorities cited below the page. In some instances, however, he has erred in not specifying the peculiar doctrines of the different schools, or in blending the especial doctrine of one school with that of another. The learned author does not so fully treat of the doctrines of the other schools as he does of the two schools in the South of India, where he had to administer Justice. His work, therefore, is of greater utility in the Courts of Madras and Bombay than in those of the other provinces. The second volume of the work, which contains cases and law opinions appended by the learned author to his work, under the title of "*Responsa Prudentum*," or opinions of the *Pandits*, is indeed very valuable, almost every one of them being followed by remarks from the pen of Colebrooke, Sutherland and Ellis, or one or other of them; and the work is rendered still more valuable by containing the opinions of Colebrooke in answer to letters from the author. The above opinions and remarks are truly *responsa prudentum*, and the author's seeking Colebrooke's opinion on every difficult point, and his publication thereof in support of what he wrote, are *actiones prudentis*.

The Principles and Precedents of Hindú Law, composed and compiled by Mr. (afterwards Sir) William Hay Macnaghten, are the most clear and lucid of the digests hitherto composed by natives or Europeans. The first volume of this work treats of proprietory right, inheritance, *stri-dhana*, partition, marriage, adoption, minority, slavery, and contracts, and contains a translation of a portion of the *Mitákshará*. The second volume consists of precedents or opinions of the Hindú Law officers delivered in, and admitted by, the several Courts of Judicature, and examined and approved of by the author himself. This volume is very useful, and it would have been much

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more so had the author published in it the very valuable opinions and remarks of Mr. Henry Colebrooke, contained in Strange's Elements of Hindú Law; and his first volume, too, would have been more excellent and authoritative had he all along cited authorities in support of the principles and doctrines therein contained in the same manner and with the same prudence as Sir Thomas Strange has done.*

The work entitled "Treatise on Inheritance, Gift, Will, Sale, and Mortgage," by F. E. Elberling, Esq., late

* Mr. Morley says :—"In a late judgment delivered by the Privy Council, Sir William Macnaghten's work is mentioned as by far the most important authority amongst the Hindú Law-books by European authors; and it is stated, on the information of Sir Edward Ryan, to be constantly referred to in the Supreme Court of Calcutta as all but decisive *on any point* of Hindú Law contained in it; and that more respect would be paid to it by Judges than to the opinions of the *Pandits*." (But see Clarke's Notes of Decided Cases, pp. 115-118.) If the expression 'Hindú Law-books' mean those composed by Europeans, Macnaghten's work is for the greater part such as it is stated to be; but if it comprehend also translation and the remarks and written opinions of Europeans, then whatever has come from the pen of that eminent scholar and lawyer, Mr. Henry Colebrooke, ought to be regarded as of greater weight; especially his translations of the *Dáya-bhága* and *Mitákshará*, the former of which works is the standard law in Bengal, and the latter is respected in all the schools from Benares to the Southern extremity of the Peninsula of India as the chief ground-work of the doctrines they follow: and the translations themselves are also masterpieces, and, accompanied as they are with translations of the most illustrative and appropriate comments, &c., they are perhaps more useful than the originals. The translation of the *Dattaka-mímánsá* and the *Dattaka-chandrika*, the standard law tracts on adoption made after the manner of Colebrooke by his nephew, Mr. Sutherland, and the translation of the portion of the *Mitákshará* made by Sir William Macnaghten, and those of the *Dáya-krama-sangraha* and *Vyavahára-mayúkha*, are of equal authority with the above. Next in importance are the remarks and opinions of Colebrooke, "whose learning," says Sir Thomas Strange, "in that abstruse science, drawn directly from the original and the most authentic sources, stands acknowledged in Europe as well as India." The remarks and opinions above alluded to convey, in most instances, not only his strictures on the points referred and opinions reported, but references also to printed authorities in support of his observations, or of the answers of the *Pandits*. It is with reference to one of those opinions that Mr. Shakespear, an able Judge of the Sudder Dewanny Adawlut at Calcutta, said, alluding to Sir William Macnaghten :—"Now I imagine Mr. Henry Colebrooke to be the highest European authority on matters of Hindú Law; but supposing others to be equally well read, no one can be placed in competition with him as to the two qualifications, a knowledge of the law and of the practice and observances of this Court, in which he was so many years the Chief Judge." And Sir Francis Macnaghten too remarks :—"Upon the right of a Hindú to dispose of his property by Will, I have seen the opinion of Mr. Colebrooke, and I need not add that there is *not any man* whose opinions may justly command a greater degree of deference." The author of these pages has perused whatever has fallen from Mr. Colebrooke with great attention, and found him most accurate and deep, resulting from a thorough study of the Sanscrit books of law mentioned by him, books the whole of which are rarely read by the majority of the lawyers of any school.

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of the Danish Civil Service, contains some principles of the Hindú Law, and on the whole is a good compendium, but as regards the Hindú Law cannot be viewed as quite a safe guide. Although the author has acted judiciously in citing authorities and precedents in support of the principles contained in his work, yet his precaution seems to have sometimes failed him. The author appears totally unacquainted with the Sanscrit language, in which (to use the expression of Sir William Jones) the Hindú Law is for the most part locked up; and more could not, therefore, be expected from one whose knowledge of the sources of that law is so limited.

Steele's Summary of the Law and Custom of Hindú Castes, printed by order of the Governor in Council of Bombay, is inconvenient for reference, on account of a want of proper arrangement; but it contains a mass of useful information, and may always be consulted with advantage. He divides his works into three parts,—law, castes, and existing customs: the two latter divisions are especially useful, as containing a quantity of matter not to be met with in any other English book.

Colebrooke's Treatise on Obligations and Contracts hardly comes within the class of works treating of Hindú law, inasmuch as it relates to the subject of contracts generally. He has, however, illustrated the law of contracts throughout by references to the Hindú system; and the student will find much that is valuable regarding that system under those titles which the learned author has completed. Unfortunately the work was never finished, and the preface and preliminary matter, promised by the author in the first and only published volume, have never seen the light.

The tract written by Rájá Rám-mohan Roy treats chiefly of proprietory right, supported by citations of

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authorities, the Sanscrit texts quoted being accompanied with English translations. It would have been a great benefit to the public had similar essays on the other heads of our law been written by that eminent scholar.

The Table of Successions by Bábu Prasanna Kumár Thákúr, a living authority of great experience and repute, is a very ingenious production: it presents in one view the whole order of succession to property, whether that of males or females, with useful and explanatory notes. It is in fact a Digest of the Digests, but requires ability to understand the plan and master the contents.

I have, I think, given an all but complete list of the works which treat of the *Vyavahára* branch of our law. It remains to notice how justice is administered in accordance with that law on which so many works are extant. The judges, barristers, pleaders, and others who know English, have recourse to the English translations and Digests. But no such means are available to the numerous native judges, pleaders, and suitors who do not know that language, and are not furnished with translations or proper treatises in the vernacular.* They are, therefore, entirely dependant on the *Pandits*, the venality of many of whom has disparaged the character of that body

* The law tracts hitherto written in Bengali are four in number; but they are deficient in many respects, and therefore of very little utility: they vanished as soon as they appeared, having never been brought into use. The first of these is entitled the *Vyavahára-ratnamálá*, written by Lakshmí-náráyan Nyáyálankára in the form of questions and answers with the authorities in Sanscrit. This work contains a succinct view of the law of inheritance according to the doctrines of *Jímúta-váhana*, contrasted with those of the *Mitáksharā*, together with a short treatise on adoption. The next is the compilation by Rám-jívan Tarkálankára. It is a collection of the doctrines of the *Dáya-bhága* and other works. These two works are mentioned in a letter from the Bengal Government to the Court of Directors under date the 22nd of February 1827, as being among the works encouraged and patronised by the Government. The third was written by *Gangá-kishore Bhattáchárjya* of *Bhahorá*. It treats of inheritance, impurity, and expiation, but superficially and imperfectly. The fourth is a little pamphlet written by ABHOYÁCHARAN TARKAPANCHÁNANA, a well-known logician. This book contains only the abstract principles of the *Dáya-bhága*.

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(though some were and are indeed most upright as well as learned) to such a degree that we should be justified in adopting the language of Sir William Jones already cited.

Add to this, it happens in many cases that in consequence of the Mofussil pleaders having no means of knowing the law except from the mouths of *Pandits*, no question touching the Hindú Law has been raised until they have come in appeal before the Sudder Dewanny Adawlut, where the pleaders, familiar with the law tracts in English, have raised law points, and then the cases either result in nonsuit or are remanded to be tried *de novo*, and thus the parties are fruitlessly burthened with costs of the two Courts. This evil has been very little or very partially remedied by the English translations and Digests of the Hindú Law, they being of use to those only who know English, and who, compared with the mass of judicial officers and legal practitioners in the Mofussil, are insignificant in number; consequently, without a good Digest in the English language, combined with a corresponding one in the vernacular of the country, the evil could not be removed, nor the desideratum felt by Sir William Jones and others supplied. It was a matter of great regret that no such endeavour had hitherto been made. The Government have enacted that the cases of the Hindús, regarding inheritance, &c., shall be decided according to their law, but have afforded no means of making a proper use or checking the abuse of that law. This was remarked to the author by one of the most intelligent judges of the Sudder, now no more, who at the same time requested him to translate into Bengali and Urdu the Principles of Hindú Law by Sir William Macnaghten. That work was thereupon minutely gone through, with a view to determine if a transla-

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tion of it would be sufficient for the purpose, when it was judged that the work itself required some additions to be made to it and some portions to be rectified to render it correct and complete. The translation and publication of the *Dáya-bhága* and *Mitákshará* on Inheritance, the *Dattaka-mímánsá* and the *Dattaka-chandriká* were considered likely to be more expensive and tedious than useful at present, inasmuch as considerable parts thereof are composed of arguments tending to establish the author's own opinions and to refute those of others. It would, moreover, be very difficult for such as would not thoroughly study and digest them readily to discover the principle or decision regarding any point; for it is not rarely the case with those works that in one place a principle appears to be laid down as decisive, but in another (perhaps at the distance of many pages) will be seen a passage which refutes and explodes the former and establishes another. Translations of those works cannot, therefore, be of great use to those who cannot devote much time to a diligent study of their contents. Besides, now-a-days, the judges for the most part consider it safe and convenient to follow the decisions of their learned predecessors, instead of taking the trouble of ascertaining for themselves the law on the point or points at issue.* Hence, the principles laid down in the previous decisions and the opinions of the law officers followed in those decisions and admitted by the Courts of Justice, form in a great degree the practical part of the law. Consequently, in

* They ought, ever, to be warned that, amongst the decisions passed in accordance with the Hindú Law, there are some which are not correct and accurate with reference to that law; and as decrees are in themselves not law, but merely the application of the law to particular cases, and as the dispensers of justice are by their oaths bound to decide each case upon its own merits in conformity with law, usage, and principles of justice, they should not (and cannot conscientiously) follow a precedent without being satisfied that that precedent is in conformity with the law they are to administer. Precedents, therefore, ought to be applied after great consideration and with due circumspection.

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the present state of legal practice, it will not be enough if a digest include only the principles contained in the law tracts and the authorities on which they rest ; but to be practically useful, such a work is needed as will comprise all the principles laid down in the current law tracts, the unreversed or final decisions, and the admitted law opinions, illustrated by precedents. Moreover, it is required to be not only in the vernacular but also in English, inasmuch as all the desiderata are not to be found in any single English book, and perhaps not in all of those hitherto written. It is, moreover, very difficult for a person to procure a large number of the English books on the subjects in question, and still more so, if he be in possession of them, to find out what he requires without losing much time in the attempt. To compile a work of the above description requires, I confess, more time and talent than I possess. But as no one more talented and experienced has undertaken this arduous task, and the want of such a work continues to be felt by both *Mofussil* and metropolitan practitioners and others, I commenced the work in the hope of providing for the defect as far as my humble abilities would allow, and the following pages constitute the result of my labours.

I thought at first that it would be sufficient to supply the *Vyavasthás* or principles in Bengali and English, with authorities and precedents bearing thereupon. But it occurred to me that if I did not give the Sanskrit passages expressive of those principles and the texts of the holy sages and other great authors on the authority whereof those principles were laid down, there would still be left for the ingenious portion of the *Pandits* a field to work upon. And the little experience that I have had in this department of jurisprudence suggested to me that it was necessary to publish separate books

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for Bengal and the other schools, as it is very difficult to preserve all along the distinction between the laws as current in Bengal and those in the other schools; so much so that even Sir William Macnaghten, who seems to have taken much care about it, has sometimes forgotten it, and blended the special doctrines of one school with those of another. But even were I careful in making the distinction throughout, still the reader who would not make himself master of them, would very probably overlook them and fall into error.* Add to this the vernacular language of the different schools not being one and the same, the principles, precedents, &c., having reference to Bengal, required to be translated into Bengali, and those peculiar to the other schools into the vernaculars of those provinces, at least into Urdu, which in a manner is understood throughout those countries. If, however, all the principles, &c., were to be thrust into one work and translated into Bengali and Urdu, the work would not only be swollen to an inconvenient extent, but the reader would have to pay for a portion which he would not require. On these considerations I have resolved on two separate books; and the present is the book for Bengal.

In this book the *Vyavasthás* or principles laid down in the *Dáya-bhága*, *Dáya-tattwa*, *Dáya-krama-sangraha*, SRÍ-KRISHNA'S Commentary on the *Dáya-bhága*, and JAGAN-NÁTHA'S Digest, and also in the other Sanskrit books respected in Bengal, and the decided cases and precedents, are inserted regularly and consecutively; and under each of these the reason (if any) for the establishment of such *Vyavasthá* is given; after which the autho-

* "In a general compilation," says Mr. Colebrook,e "where the authorities are greatly multiplied, and the doctrines of many different schools and of numerous authors are contrasted and compared, the reader is at a loss to collect the doctrines of a particular school and follow the train of reasoning by which they are maintained. He is confounded by the perpetual conflict of discordant opinions and jarring deductions, and by the frequent transition from the positions of one sect to the principles of another."—*Dá. bhá.*, pref. p. iii.

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rity or authorities in support thereof have been cited with the name of the author or authors. If any phrase or term in the text required to be expounded, a letter within parenthesis is put after that, and an explanation thereof given generally in the words of some commentator or digest-writer in a following paragraph, beginning with the same letter within parenthesis, in order that the ingenious *Pandits* may not, for the purpose of misleading, give a different turn to the phrase or term, for they have no authority to give a meaning or exposition different from that adopted by the commentators or authors of each school; and if a principle is deduced from such explanation, that also is given with the authority or authorities, if any. Then, in foot-notes, references are made in abbreviated forms to the Sanskrit and English books, and the volumes, chapters, sections, and pages, at which the *Vyavasthás*, authorities, &c., contained in this book are to be found. Almost the whole of the most interesting and valuable remarks and observations of the Sanskrit and English writers on the Hindú Law have been inserted herein, occasionally in the body, but generally in the foot-notes, which contain also much interesting information. After giving the principles, authorities, &c., respecting one portion of a subject, I have given the whole of Macnaghten's precedents bearing thereupon, that is, the legal opinions on the same subject admitted by the several Courts of Judicature and examined and approved of by that learned gentleman.* Then are given the decided

* These extend as far as the year 1829. I had a great desire to select and add other admitted opinions of the law officers down to the present time, but have been unable to do so, as they had been burnt in pursuance of the orders of the Sudder Court.

I reserve for the second book the *responsa prudentum* and the valuable remarks thereupon which constitute the second volume of Strange's work on Hindú Law, they having relation to cases of Southern India and the law as current there.

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cases illustrative of, and bearing on, one or more of the *Vyavasthás* on the same subject. Of these, the decided cases and precedents are given in English and Bengali, and the rest generally in Bengali, Sanskrit and English: the Bengali in the first and the Sanskrit in the second column of the left hand page, and the English in the page to the right thereof. To save the reader time and trouble I have, moreover, kept the *Vyavasthás*, distinguished by numbers, large type, and the marginal expression "*Vyavasthá*," that he may at once find them out without being obliged to look over the entire page. The nature of the rest of the contents also will be easily known by the several marginal expressions used for the purpose.

Most of the report books from which the cases have been taken being rather scarce, it was not considered sufficient to give only the names of parties and dates of the decisions, leaving the readers to procure, and refer to, the original books, a complete set of which (if at all procurable) would perhaps cost them more than ten times the price of the present work, and even then, without a translation in the vernacular, they would be of very little use to those who do not read English. I have, therefore, given in English and Bengali the whole of the important portion of almost every decision.

In selecting the decided cases of 1850 bearing on one or more of the *Vyavasthás* under each head, Mr. Morley's Analytical Digest, in which the substance of the decided cases has been well arranged under proper heads, has been of great assistance to me. The book is very convenient for use, and saves those who search for precedents on particular points a great deal of time and trouble. The only thing to be regretted is that the compiler, being, as he is, a learned barrister, has not taken the trouble of himself drawing up abstract of

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the Sudder decisions, especially those in the Select Reports, instead of putting down their own marginal notes, which are sometimes inaccurate, sometimes insufficient, and often not such as they ought to be. His introduction to the Hindú Law is full and elaborate. I have extracted some passages therefrom almost *verbatim*, because I found them to be correct and so well written that I thought I could not do better.

In the Supreme Court the Hindú Law governs suits between Hindús in respect to contracts, succession, and inheritance;* and in the other Courts in respect to succession, inheritance, marriage, caste, and religious usages and institutions.† These, therefore, have been the subject of the present work, and not the whole of the eighteen titles‡ of the *Vyavahára-kánda* of our *Dharma Shástra.*

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* The Statute 21st, Geo. III, Chapter 70, provides "that their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party shall be determined, in the case of the Mahomedans, by the laws and usages of Mahomedans, and in the case of Gentoos by the laws and usages of Gentoos."

† By Section 15, Regulation IV, 1793, re-enacted for Benares and the Upper Provinces by Regulation V of 1795, Section 3, and Regulation III of 1803, Section 16, it is provided that "in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Hindú Laws with regard to Hindús are to be considered as the general rules by which the Judges are to form their decisions." Although the provisions in the enactments cited would appear to exclude cases of contract, yet there are questions incidentally involved in this subject, and it is so interwoven with cases which it is the duty of the Courts to decide agreeably to the Hindú Law, that attention to the principles of the one may be essential to the due adjudication of the other. For instance, in a claim of inheritance the defendant may plead a title by purchase, and the question will arise as to how far the ancestor was at liberty to contract.—See Macn. H. L. pref., pp. vii, viii.

‡ "Of those titles *the first* is debt, or loans for consumption; *the second*, deposits and loans for use; *the third*, sale without ownership; *the fourth*, concerns among partners; *the fifth*, substraction of what has been given; *the sixth*, non-payment of wages or hire; *the seventh*, non-performance of agreements; *the eighth*, rescission of sales and purchases; *the ninth*, disputes between master and servant; *the tenth*, contests on boundaries; *the eleventh, and twelfth*, assault and slander; *the thirteenth*, larceny; *the fourteenth*, robbery and other violence; *the fifteenth*, adultery; *the sixteenth*, altercation between man and wife, and their respective duties; the *seventeenth*, the law of inheritance; *the eighteenth*, gaming with dice and with living creatures. These eighteen titles of law are settled as the ground-work of all judicial procedure in this world.—MANU, Chap. 8, *Vs.* 4–7.

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Of these again, as questions connected with succession, inheritance, (which comprises also usage, maintenance, partition and exclusion from inheritance,) adoption, debt, gift, and sale are frequently brought before the Courts of Justice, they have been copiously treated of; while the other subjects have been but slightly adverted to, they being generally adjusted by reference to private arbitration. And designed as this work is for practical utility, I have omitted those questions regarding inheritance, &c., which are obsolete in the present age, such as the doctrines relative to the various descriptions of sons, other than the *Ourasa* and *Dattaka*, and those respecting sons by mothers of different tribes and marriage with females of a different class, as also some topics of contract, namely, evidence, &c., the law regarding which is not followed in the established Courts of Justice.

This book is divided into two volumes, the first of which is now offered to the public. The second volume, which is to contain the chapters on marriage and *Strí-dhana*, adoption, and exclusion from inheritance, and a few remarks on castes, &c., will not be of the same bulk, and will, I hope, be soon ready for publication.

On points difficult and doubtful I have consulted Bábu Prasannakumár Thákur, whose learning in this abstruse science, drawn from the fountain head as well as from other sources, coupled with his long experience and his practice at the Sudder Bar, of which he was for so many years the ornament and leader, is everywhere acknowledged, and who, though engrossed by various avocations of high importance, has readily given me all the assistance I required. I cannot conclude these remarks without acknowledging my great obligation to him for so much and valuable assistance received. Nor can I omit to express my best thanks to the present Professor of Law in

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the Government Sanskrit College, the most learned Pandit Bharata-chandra Shiromani, whose opinion, too, I have obtained on difficult and doubtful points, and whose valuable assistance I have received on these and many other occasions. I also gratefully acknowledge the obliging assistance occasionally rendered me by Mr. W. Montriou, barrister, while we both were at the Sudder Court.

Though I have spared no time that it was possible for me to bestow in collecting and digesting all that is most useful for the administration of the Hindú Law as current in Bengal, in the most valuable law tracts and books of decided cases and precedents, and have omitted nothing which diligence, in the midst of official avocations, could effect to render the work complete in its kind and fitted to supply the desideratum felt, yet it is not for me to say how far my efforts may be crowned with success. The judgment as to whether the work is adapted to accomplish the objects I have had in view must, in this as in all similar cases, emanate from that most impartial of all tribunals—Public Opinion.

PREFACE TO THE SECOND EDITION.

The first impression of this work, consisting of 1,000 copies, has been sold. The author feels very deeply indebted to the public for this unequivocal mark of its approbation, and has strenuously laboured to render the work less undeserving a continuance of the favor with which it has been honored. In the prosecution of this object he has subjected every part of it to a careful revision, has endeavoured to eradicate the errors that had escaped his notice, to improve those parts that were incomplete, and to supply such matter as had been omitted.

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He has enlarged the work much by the addition of numerous decisions of the Privy Council, the Sudder, Supreme and High Courts, as well as by the insertions of several useful texts, remarks, and notes. And he has carefully noted those cases by which doubtful points have been set at rest, and disputed questions of law settled. The index has been thoroughly revised, and made much more copious than before, especially in those parts which relate to adoption and the succession of widows.

The author has thought it advisable to separate the English from the vernacular, and to consolidate the two volumes into one. English students do not require the vernacular, and the retention of it in the present edition would have not only swelled the work and made it unwieldy, but also doubled the price. As at present offered the work is of 8vo. size, consisting only of this volume with an index attached. It is thus convenient for carriage, handing and reference.

The author would draw attention to the fact that though the English in this edition is separated from the vernacular, great care has been taken not to disturb the internal arrangements. The *Vyavasthás* or principles in English bear the same numbers as those in the vernacular, and they, as well as the other passages, are placed in the same consecutive order. Thus it is quite easy to trace out the corresponding passages in the two books.

The author regrets that his official duties, which are many and great, should have precluded him from giving to this edition so much time and attention as the subject demands. Nevertheless, no ordinary amount of labour has been expended upon it, and no pains have been spared to make it more useful and complete than the former. It is hoped that the effort has been successful.

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PREFACE TO THE THIRD EDITION.

A PECULIAR, a melancholy interest attaches to the publication of the present edition of the *Vyavasthá-Darpana*, as the last work of my lamented father's long and laborious life. He had carefully revised, and enlarged with much additional and useful information, the text of the second edition, when he was suddenly overtaken by death on the 15th September 1882; and it has fallen to my unhappy lot to take steps that the ripe fruits of his assiduous labours should not be lost to the world. But grief at his unexpected loss and business connected with the arrangements of his private affairs, have hitherto fully occupied my time; and it is only now that I am able to bring out this last edition of the most valuable work with the last touches from the author's own hands.

In this edition the learned compiler has adopted the method followed in the *Vyavasthá-Chandriká;* that is, he has separated the Principles from Precedents in the different parts referring under each *Vyavasthá* to the pages of the book in which the Precedents are to be found. In other words the principles, reasons, authorities, explanations, remarks, annotations, notes, precedents, legal opinions, and *responsa prudentum* have been arranged in the same manner as in the *Vyavasthá-Chandriká.*

In many *Vyavasthás,* he has cited the authorities of other Schools, *i. e.*, Benares, Mahratta and Dravida, where they do not differ in substance from those of the Bengal School.

In this edition the compiler has inserted several new *Vyavasthás* and supported them by various authorities from the decisions of the learned Judges of different Courts in India.

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In the Second Part he has added many important cases recently decided by the Privy Council and the High Courts of different Provinces.

I cannot here close these remarks without expressing my best thanks to Bábu Harish Chandra Kaviratna, Additional Professor of Sanskrit in the Presidency College, Calcutta, who has rendered, to my late lamented father, great and valuable assistance in the preparation of this work as well in carrying it through the Press.

CALCUTTA:
The 10*th August*, 1883. } THE PUBLISHER.

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PART I.

PRINCIPLES OF HINDU LAW

WITH

AUTHORITIES, &c., &c.

IN FIVE BOOKS.

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The Orthography and Orthoepy of Sanskrit Words, &c.

To ensure the proper pronounciation, principally of the Sanskrit words in Part I of this work, I have written them according to the following Romanized system, partially modified from *that* which was originally proposed in the first volume of the Asiatic Researches, and followed by Sir William Jones, Mr. H. Colebrooke, and others.

A : as *a* in *c*all or *s*alt.
Á : as *a* in f*a*r.
I : as *i* in f*i*t.
Í : as *i* in machine or as *ee* in f*ee*ding.
U : as *u* in p*u*ll.
Ú : as *u* in r*u*le or *oo* in p*oo*l.
E : as the first *e* in th*e*re, *ai* in p*ai*n, or the French *é*.
O : as *o* in g*o*.
Oi : as *oi* in her*oi*ne, or as the Greek dipthong *oi* in *poinmen*, a shepherd.
Ou : as *ou* in *out*.
Oy : as *oy* in j*oy* or b*oy*.
Kh : as *kh* in blac*k-h*ole.*
G : as *g* in *g*ew*g*aw.
Gh : as *gh* in bi*g-h*ouse.*
Ch : as *ch* in *ch*alk.
Chh : as *chh* in mu*ch-h*aste.*
Jh : as *geh* in colle*ge-h*all.*
T : as *t* in *t*alk, or soft as in *tu* (Italian or Portuguese.)
Th : as *th* in ho*t-h*ouse,* or soft as in *th*oroughly.
D : as *d* in *d*aw, or soft as in *da* (Portuguese.)
Dh : as *dh* in goo*d-h*ouse,* or soft as the last aspirated.
Ph : as *ph* in *Ph*ear.
Bh : as *bh* in Ho*b-h*ouse.*
Y : as *y* in jo*y* or bo*y*-hood.
W : as *w* in d*w*arf.
Sh : as *sh* in *sh*ot.
S : as *s* in *s*oft or in *s*ugar.

ABBREVIATIONS.

B. L. R.	For Bengal Law Reports.
Bom. H. C. R.	„ Bombay High Court Reports.
Cal.	„ Calcutta.
C. R.	„ Civil Rulings.
C. J.	„ Chief Justice.
Chap. or Ch.	„ Chapter.
Coleb. *Dá. bhá.*	„ Colebrooke's translation of the *Dáya-bhága.*

* When pronounced together or indistinctly.

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Coleb. Dig.	For	Colebrooke's Digest of Hindú Law.
Con. H. L.	„	Sir Francis Macnaghten's Considerations on the Hindú Law.
D. Ch.	„	Dattaka Chandriká.
D. Mí.	„	Dattaka Mímánsá.
Dá. Bhá.	„	Dáya-bhága.
Dá. Kra. Sang.	„	Dáya-krama-sangraha.
Dá. T.	„	Dáya-tattwa.
Dec. or D.	„	Decisions or Decrees.
Elb. In.	„	Elberling's Treatise on Inheritance, &c.
H. C.	„	High Court.
H. C. A.	„	High Court in its Appellate Jurisdiction.
H. C. O.	„	High Court in its Original Jurisdiction.
Ind. L. R.	„	Indian Law Reports.
J.	„	Judge or Puisne Judge.
Mad. H. C. Rep.	„	Madras High Court Reports.
Macn. H. L.	„	Sir William Macnaghten's Principles and Precedents of Hindú Law.
Mit.	„	Mitákshará.
N. W. P.	„	North-Western Provinces.
P.	„	Page.
Para.	„	Paragraph.
P. C.	„	Privy Council.
Pref.	„	Preface.
S. C.	„	Supreme Court.
Seri.	„	Series.
S. W. R.	„	Sutherland's Weekly Reporter.
Sect. or Sec.	„	Section.
Smri. Chan.	„	Smriti-chandriká.
Str. H. L.	„	Sir Thomas Strange's Hindú Law.
S. D. A.	„	Sudder Dewanny Adawlut.
V.	„	*Vachana*, Verse or *Versus*.
V. Ch.	„	Vyavasthá-chandriká.
Vi. Chi.	„	Vivádа-chintámani.
Ví. Mi.	„	Víra-mitrodoya.
Vol.	„	Volume.
Vyav. Mayú	„	Vyavahára-mayúkha.

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VYAVASTHÁ-DARPANA.

BOOK I.

ON OWNERSHIP—RIGHT—HERITAGE—TITLE TO INHERITANCE, &c.

CHAPTER I.

ON OWNERSHIP—RIGHT—HERITAGE, &c.

SECTION I.

ON OWNERSHIP AND RIGHT OF PROPERTY.

1. Ownership or right is produced by acquisition through any of the virtuous or popular means of acquisition recognized by the world, as well as by law. *Vyavastha.*

Annotations.

1. If it be asked, then, what rule is there to show that such a mode of acquisition has been recognized by the world and such a mode has not, the same author (BHAVA-NÁTHA) states: "A *Smriti* or code of law, like Grammar and the rest, has been framed in order to show what are the rules established in the world from the earliest period." The purport is, that such modes of acquisition alone as have, from the beginning, been recognized by the world, are capable of conferring ownership; that they are necessary to be learnt in order to ascertain how property can be acquired in both worldly and religious matters; and that, therefore, with the object of showing what are the modes of acquisition thus recognized by the world, the Institutes of law (*Dharma Smriti*) framed by GOUTAMA and others set forth:—"An owner is by inheritance, purchase, &c."—*Smri. Chan.*, Chap. I, cl. 27.

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Authority. MANU :—There are seven virtuous means of acquiring property : succession, gain (*lábha*)* and purchase or exchange, *which are allowed to all classes ;* conquest, *which is peculiar to the military class ;* lending at interest (*prayoga*), husbandry or commerce (*karma-yoga*), *which belongs to the mercantile class ;* and acceptance of presents *by the sacerdotal class* from respectable persons(*a*).—Chap. X, *Vachana* or verse 115.

Explanation. *(a)* Seven means of acquiring property, *viz.*, inheritance and the rest, are said to be virtuous. 'Inheritance'—wealth by descent ; 'gain (*lábha*)*'—gain of a hidden treasure or presents from friends and the like ; these three are the virtuous means of acquisition for all the four classes. Wealth (gained) by victory is a virtuous acquisition for a *Kshatriya* on account of (the same being obtained by) conquest. The investing of wealth at interest, &c., (*prayoga*), also agriculture and trade or commerce, are the virtuous means (of acquisition) for a *Voishya.* The acceptance of a gift or present is a virtuous means (of acquisition) for a *Bráhmana.—Kullúka Bhatta's* Commentary on the above text.

Authority. GOUTAMA :—An owner is by inheritance, purchase, partition, seizure or finding. Acceptance for a *Bráhmana,* conquest for a *Kshatriya,* gain for a *Voishya* or *Shúdra* are additional [causes of property].†

There are also other means of acquisition, which, however, persons can have recourse to in times of distress :—

Authority. Thus MANU :—Learning, *except that contained in Scripture,* art, *as mixing perfumes and the like,* work for wages, menial service, attendance on cattle, traffic, agriculture, content with little, alms, and receiving high interest on money, are ten modes of subsistence *in times of distress.*—Chap. X, *v.* 116.

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* Sir W. Jones renders the word "*lábha*" by 'occupancy or donation' which seems to be at variance, not only with the lexicographical meaning of the word, but also with the interpretations of the commentators,—more especially with that of *Kullúka Bhatta,* whose commentary he has implicitly followed in his translation, and from which he has supplied the inuendoes put in Italics as in the translation of the above text. (See his Preface, page 15.) *Kullúka Bhatta's* first interpretation of the word '*lábha*' is the same as that of '*adhi-gama*' used in the text of GOUTAMA (to be presently cited), which Mr. Colebrooke renders by 'finding;' and then according to the interpretation given in the *Mitákshará,* he (Mr. Colebrooke) says :—"*finding* is the discovery of a hidden treasure." (See *Mit.*, Chap. I, Sect. i, § 13.) A translation of *Kullúka Bhatta's* Commentary on the above text is therefore given just below the text itself, in order that the reader may see and judge for himself.

† These eight, says GOUTAMA, are causes of property and ownership, not possession and enjoyment.—*Mit.* Sans., p. 41.

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It being ordained that these are the modes or means of subsistence in times of distress, if any person has been prohibited from following any of these occupations in other times for his livelihood, he is allowed to follow it in times of distress. Thus a *Bráhmana's* working for wages, performing menial service, and living upon art, &c., (are allowed in times of distress though prohibited at other times).—*Kulúka Bhatta's* Commentary on the above text. Hence,— Explanation.

2. The modes or means of acquisition regulated by MANU, GOUTAMA, and the rest for persons of the different classes, at particular times, are a matter of popular as well as legal recognition, and the acquisition so made produces Ownership as well as Right. *Vyavasthá.*

SANGRAHA-KÁRA says:—"One cannot be owner of a property simply because he is in possession of it, for does it not occur that possession by one of another's property is obtained even by theft or other nefarious means? Therefore, ownership is deducible from the *Shástra* alone, and not from mere possession."* Authority.

The meaning of this is that, a thing cannot be concluded to be the property of one simply because it remains in his possession, for, if so, one that obtains possession of another's property by theft or the like would have also to be called the owner of such property.* Explanation.

So also VIJNÁNESHARA:—"It should not be alleged that even what is obtained by robbery or nefarious means would be property. For proprietary right in such instances is not recognized by the world, and it disagrees with the received practice."—*Mit.* Inh., Chap. I, Sect. i, § 11. Hence— Authority.

3. Any thing that is acquired by virtuous or honest means is property of the acquirer, and such acquisition produces both his ownership (*swámya*†) and property or right (*swatwa*†) according to the received practice as well as law. *Vyavasthá,* conclusive.

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* *Smri. Chan.*, Chap. I, cl. 24.

† Property or right (*swatwa*) has reference to the thing, and ownership (*swámya*) to the person. The relation which a thing bears to its owner is called '*swatwa*,' and the relation which an owner bears to his property is called '*swámya*.'

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SECTION II.

HERITAGE DEFINED.

Vyavasthá. **4.** The word 'heritage (*dáya*)' is used to signify property, in which right dependant on relation to the former owner (*b*) arises on the extinction of his ownership(*c*).

Explanation. (*b*) The condition, 'dependant on relation to the former owner,' obviates the possible use of the word heritage in speaking of gift and the like.—That relation, originating from birth, study, marriage, and so forth, is filiation, fellowship in study (of the *Veda*), conjugal union, or the like.—*Coleb.* Dig., Vol. II, p. 517.

Explanation. (*c*) The phrase 'on the extinction of his ownership,' obviates the use of the term heritage, under the text which describes the concurrent right of the wife during the life of her husband.—*Sri-krishna Tarkálankára,* quoted in the *Viváda-bhangárnava.*—See *Ibidem.*

Annotations.

4. The term 'heritage *(dáya)*' signifies by acceptation right vested in a relative, in respect of property, in right of relation (as son or otherwise) to its former owner on the extinction of his right.—*Dáya-tattwa.*

The term 'heritage (*dáya*)' signifies *that* wealth which becomes the property of another, solely by reason of relation to the owner.—*Mit.* Inh., Chap. I, Sect. i, § 2.

The term 'heritage' again is said to be constituted of the property to which (one's) right accrues, solely by reason of (his) relationship to the owner.—*Vir. Mi.*, Chap. I, cl. 3.

DHÁRESHWARA describes heritage as follows:—"By 'heritage' is meant *that* wealth which descends either from the father, or from the mother." The particle '*cha*,' used in the above text of DHÁRESHWARA, shows that the property inherited from others besides the father and mother, is also included in the term 'heritage.'—*Smri. Chan.*, Chap. I, cls. 5, 6.

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SECTION III.

On Heritable Right and the Cause thereof.

5. The existence (*e*) [of the son], at the time of the father's death(*d*),* alone constitutes the son's title.†—*Dá. Bhá.* Sans., p. 21. *Vyavasthá.*

Vide Precedents, pages 1 & 2.

The meaning is, that the existence of the son is the sole cause of (heritable) right, to which the time of the father's death is an aid.‡—*Srí-krishna Tarkálankára's* Commentary on the *Dáya-bhága.* Explanation.

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* Under the text which declares "property common to the married pair," the wife having an interest in the property of her husband during his life, and there being nothing to annul her right after his decease, how can the son and the rest have a claim to the estate? To this it is answered,—No; for, it is established that her right is (actually) lost by the lapse of her husband's right. Accordingly, the right of the wife is divested even when the effects are given away by her lord.—See *Coleb.* Dig., Vol. III, p. 487.

Moreover, respecting the wife's ownership in the property of her husband, it has been said by Manu and others :—"if she make a gift which is indispensably necessary, if she expend in periodical ceremonies, in entertaining guests, and so forth, while her husband is absent, such ownership will save her from the guilt of theft."—*Mitákshará.*

Although *Jímúta-váhana* has at first said :—"there is no proof of the position, that the wife's right in her husband's property, accruing to her from marriage, ceases on his demise," yet by saying immediately after it, "but the cessation of the widow's right of property, if there be male issue, appears only from the law ordaining the succession of male issue," (*vide* Coleb. *Dá. Bhá.*, Chap. XI, Sect. i, § 26), he has of course admitted that the wife's right, accrued from coverture, to her husband's property, in common with him, ceases on *his* demise, that is, on the cessation of coverture.

† See Coleb. *Dá. Bhá.*, Chap. I, § 25 ;—*Dá. T.* Sans., p. 2 ;—*Coleb.* Dig., Vol. II, pp. 508, 518 ;—W. *Dá. Kra. Sang.*, Chap. I, p. 1.

‡ Sir William Macnaghten defines the cause of heritable right in these terms :—"The most approved conclusion appears to be that the inchoate right arising from birth, and the relinquishment by the occupant (whether effected by death or otherwise), conjointly create this right, the inchoate right which previously existed becoming perfected by the removal of the obstacle, that is, by the death of the owner, (natural or civil,) or by his voluntary abandonment ;" and he refers to *Srí-krishna*, cited in *Colebrooke's* Digest, Vol. II, page 517, as his authority. This, however, is not the opinion of *Srí-krishna*, nor of any of the other authors of the law-books current *in Bengal.* None of them admits inchoate right arising from *birth.* For instance, *Jímúta-váhana* says : "There is no proof that property or right is vested by birth alone; nor is birth stated in the law as means of acquisition." (See Coleb. *Dá. Bhá.*, Ch. I, para. 19.) *Raghu-nandana* says :—"As to what is written in the *Mitákshará*, viz., 'by birth alone a person having ownership takes the property; this is a text of Goutama; so the venerable instructors maintain,'—that also signifies, the holy teachers maintain, that *on the extinction of the father's right*, his son, not any other relative, may take his property, because sons have right to the property of their father by the very relation of birth by which they are his issue, and which is superior to every other relation. It does not mean that sons have right by birth in their father's property while his (the father's) own right

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Explanation. (*d*) Here the expression '*father* and *son*'* (severally) indicates any relations.—*Dá. Bhá.*, Ch. I, § 3.

Further Explanation. That is to say, the expression '*father*' is meant to signify the predecessor or former owner, and '*son*' is meant to indicate any relative included in the order of succession as entitled to inherit. Thus (at the time of the death of the former owner) the survival of the relation, entitled to succeed, is the cause of his or her right.

Vyavasthá. **6.** (*e*) Here the term 'existence'* indicates also the fœtal existence of an heir, though his coming out of the mother's womb must be awaited.†

Vide Precedents, pages 3—6.

Annotations.

6. It is not necessary that the heir should be actually born; it is sufficient that he was begotten and afterwards born with vitality; when born with vitality, it is of no moment how soon after the child may expire; the right of inheritance is acquired, and the inheritance devolves on the heirs of the child.—*Elb. In.*, Sect. 84.

If a widow of a deceased co-heir happen to be pregnant at the time of his death, or be supposed to be so, either partition should wait, or a share should be set aside, to abide the contingency of her having an after-born son; failing which, it reverts, and is distributable subject to the maintenance of the widow.—*Stra.* H. L., Vol. I, page 207.

subsists; for that would contradict DEVALA'S text: "when the father is deceased, let the sons divide the father's property, for they have no ownership while the father is alive and free from defect."—*Dáya-tattwa.* And *Srí-krishna*, a follower of *Jímúta-váhana*, has nowhere used any expression which supports the proposition laid down by Sir William Macnaghten. On the contrary, *Srí-krishna*, in his comment on *Jímúta-váhana's Dáya-bhága*, says;—"the text of GOUTAMA, which is cited in the *Mitákshará*, is unauthorised, or, if it be authorised, it relates to the case of one, whose father dies while the child is in the mother's womb; else a father, who has a male issue, would not be independent in regard to his own goods." (*Vide* Coleb. *Dá. Bhá.*, Ch. I, § 19, Annotation.) He then subjoins an interpretation similar to that which occurs in the *Dáya-tattwa*, and which is above quoted. Thus we are justified in the conclusion that Sir William Macnaghten's definition of the cause of heritable right is not according to the doctrine current in Bengal.

Accordingly it has been adjudged as follows:—

"Whatever objection may arise to such a disposition in other parts of India, from the doctrine that inchoate right of the son to property is from his birth, none such can arise in Bengal, where the above doctrine is not recognized, where, whilst the father lives, and is free from defect, the sons have no right at all, and where, by the power of making testamentary dispositions of property, the father, if so minded, can will away, even to a stranger, the whole of his ancestral property."—Part of the late Sudder Court's order admitting review of judgment in Bhuban-moyí Debia against Rám-kishor A'chárjea, petitioner, under date the 14th of January 1860.

* In *Vyavasthá* 5.

† See the Succession of the father's daughter's son.

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Because, if the issue be a male and alive, it would at once succeed, if a daughter, she may or may not succeed (as the case may be), whilst a still-born child would not in any case affect the succession to the inheritance. Reason.

VASHISHTHA :—A share of the heritage with the brothers shall be allotted to those widows (*f*) who have no offspring, but are supposed to be pregnant, *to be held by them* until they (severally) bear sons.—*Coleb.* Dig., Vol. III, p. 86. Authority.

(*f*) Widows here signify wives of deceased brothers. If they be supposed likely to bear sons, shares must be also allotted to them: consequently, the meaning is that shares are only allotted to the widows *for the behoof of their sons* (to be born).—*Coleb.* Dig., Vol. III, p. 86. Explanation.

Srí-krishna Tarkálankára in the following instances has recognized the right of the child in the womb.—In his exposition of NÁRADA's text,—"where a division of the paternal estate is instituted by sons, that becomes a topic of litigation, called by the wise, partition of heritage,"—he says: "the term '*by sons*' is merely illustrative, for if it exclusively mean *plurality and agency of sons*, it cannot comprehend the partition made between two (parceners), by the intervention of an arbitrator, and (on account) of the child in the womb." He says also:—"the text of GOUTAMA, (*viz.*, 'By birth alone a person having ownership takes the property,'*) which is cited in the *Mitákshará*, is unauthorised; or, if it be authorised, it relates to the case of one, whose father dies while the child is in the mother's womb." —See *Srí-krishna's* Commentary on the *Dáya-bhága* Sans., pp. 2, 4, 18. Authority.

Although the child in the womb does not inherit, yet it suspends (for a time) the succession to the property to which it would succeed, (if born a male and alive;) for, were it held otherwise, (that is, if any inheritance or property were vested in the child *in utero* immediately after the extinction of the owner's right,) then, on its dying *in utero*, or abortion taking place, its *own* heir would inherit and not the heir of the late owner, but this is inconsistent with the law and contrary to usage. Conclusion.

7. The property which a child in the womb is to inherit on its being born a male and alive, should, *Vyavasthá.*

* See *Vyavasthá-chandriká*, Vol. I, Part i, page 15.

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however, be deposited with his next friends *(bandhus* and *mitras)* for safe custody until he attain majority.*

Authority. KÁTYÁYANA :—Let them deposit, free from disbursement, with *bandhus* and *mitras*, the property of such as have not attained maturity, as well as of those who are absent. Likewise the property of minors should be preserved until they attain their full age.—*Dá. Bhá.*, Chap. III, Sect. i, § 17.

Vyavasthá. 8. (*d*) Here, by the term 'death,'† physical death alone is not meant: it alludes also to a person's excommunication or degradation for sin(*g*), entering into an order other than that of a householder, being missing for a period beyond that

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Annotations.

7. At the time of partition a share must be reserved *for the sons* of the widowed wives of the brothers, who are pregnant by their husbands, until the delivery of children; and if no male issue be produced, the above-mentioned shares should be taken by them, that is, by the living brothers: such is the meaning.—*Vi. Chi.*, page 292.

The right of after-born sons has been already mentioned. A minor's share should be secured for him.—*Stra.* H. L., Vol. I, page 188.

8. There are two occasions, upon either of which, wherever the Hindú law prevails, dominion may be transferred from the father in his life, without his consent, whether the property claimed by the sons to be divided, be ancestral or acquired: These are *voluntary devotion*, by which a father is considered as having renounced it, and *degradation* from caste, by which it is forfeited.—*Stra.* H. L., Vol. I, p. 184.

Not only upon his demise, but upon his renunciation of worldly concerns with a view to the ending his days in devotion, or, after such an absence from his family as may justify the inference that, if not in fact dead, he has abdicated his temporal rights, the latter, in effect, by anticipation, as it were, attaches; as it does on his degradation for crime, unexpiated.—*Stra.* H. L. Vol. I, page 122.

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* See Partition and the Chapter on Minority and Guardianship.

† In *Vyavasthá* 5.

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which is prescribed by law, and resignation of worldly concerns or voluntary abandonment.

Vide Precedents, pages 6—10.

Because each and every one of these, except the last, is held to be a civil death, and all of them cause extinction of right equally with the physical or natural death. Reason.

Death (*i.e.*, physical death) is not exclusively meant: it also alludes to degradation(*g*), or the state of a travelling devotee, and the like(*h*), because of the analogy of the circumstance which causes extinction of right.—*Dá. Bhá.*, Sans., p. 24. Authority.

(*g*) Degradation occurs when one has slain a *Bráhmana* or committed some other atrocious crime and has not performed penance, and even refuses to submit to it;* for SRÍ-KRISHNA TARKÁLANKÁRA† and RAGHU-NANDANA‡ have laid down that a fallen sinner forfeits his right when he has not done penance or is averse to doing it. Explanation.

Annotations.

8. Another undoubted one, so far as it still subsists, is, what we should call his entry into religion; that is, his assumption of the one or other, of two religious orders, by which a Hindú is accounted (as were monks, with us, before the Reformation) *dead in law;* the consequence also being the same, that his heirs take his estate. They constitute the third and fourth stages, in the progressive advancement of the Hindú, from birth to death; the first being that of a *student;* the second that of the *married man* or the *house-holder.* In entering upon the third, (the first of the two in question,) *viz.*, that of hermit (*Vâna-prastha,*) for which the appointed age is fifty, he may repair to the lonely wood, accompanied by his wife, if (says MANU) she choose to attend him. And as, therefore, in such event, a prospect of future issue may still exist, partition will be premature, while it continues to do so, so far at least as regards property inherited, according to the authorities that have been already referred to. The next is that of Anchoret, (*Sannyási* or *yati,*) when there remains nothing to prevent it from immediately taking place.—*Stra.* H. L., Vol. I, pp. 185 & 186.

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* See the Chapter on Exclusion from Inheritance.

† See his Commentary on the *Dáya-bhâga*, Sanskrit, p. 3.

‡ See *Dáya-tattwa*, Sanskrit, page 3.

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Exposition. (*h*) The order of a hermit, as well as the extinction of worldly affections, is here comprehended under the term "*and the like.*"—SRÍ-KRISHNA's Commentary on the *Dáya-bhága* Sans., p. 24. See Annotation No. 31 in Coleb. *Dá. Bhá.*, Chap. I.

Authority. VASHISHTHA :—Those who have assumed another order(*i*), are excluded from participation.—*Coleb.* Dig., Vol. III, page 327.

(*i*) An order other than that of a house-holder.—*Ibid.*

There are four orders; thus *Vámana-purána* :—

"Four orders are prescribed for *Bráhmanas: viz.*, (the order of) the married man keeping house (*grihí* or *grihastha*), the student of the *Veda* (*brahmachárí*,) the hermit (*vána-prastha*,) and the anchoret (*bhikshu*, *sannyásí* or *yati*). To *Kshatriyas* also are ordained (the first) three orders; and two (*i.e.* those of) the *brahmachárí* and *grihí*, for *Voishyas*. The only order to be entered by the *Shúdras* is that of *grihí* or *grihastha*."

Authority. After withdrawing his affection (from things of this world,) if he abdicate his estate in this form "*let this be no longer mine,*" then indeed property is divested by abdication; and afterwards, even though temporal inclinations revive, the property is not renewed. The resignation can only be known from the declaration of the party.—*Coleb.* Dig., Vol. II, page 525.

When a man, abiding in his own house, but devoting himself wholly to the worship of the Deity, to whom he has dedicated his service, withdraws from worldly concerns, he has resigned; but, when he enters into the fourth order, he becomes an anchoret. Either way, abdication is the sole ground on which his property is annulled. Consequently, divesture of property happens three ways; by degradation, by abdication or renunciation, and by natural death.—*Coleb.* Dig., Vol. III, p. 52.

Annotations.

8. If sons, *outcasts excepted*, entitled to inherit the father's estate, be equal in the possession or destitution of learning or the like, they shall all have equal shares.—*Smri. Chan.*, Chap. III, Clause 2.

8. A father, entitled to (exercise) independence or dominion being alive, his will is the cause of partition, but when he is no longer *entitled* to it, by (reason of) being *degraded, a wandering devotee or the like*, the will of (his) son is the cause of partition.—*Vír. Mit.*, (Sans.), p. 171.

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YAMA :—If no tidings of a person gone abroad be received for twelve years, his son and kinsmen should account him to be certainly dead. Authority.

In fixing the date of a missing person's death, the holy sages (*Rishis*) and compilers are not, however, of one opinion, as is manifest from the subjoined texts cited in the *Nirnoya-sindhu* :— Remark.

VRIDDHA MANU :—So if the time of twelve years of a person's absence has gone by, they shall cause his death-rites to be solemnised at the commencement of the thirteenth year.*

VRIHASPATI :—If no tidings be had of a person for twelve years, such person shall be treated as one *dead* by the burning of his effigy made of *kusha* grass.*

Bhavishya-purána :—If any one's father be absent, and neither a letter nor any news of him be received, then at the end of fifteen years his effigy shall be formed and burnt in the manner prescribed by the law : from that date all his obsequies shall be performed.*

It is said in the *Madana-ratna* that (the rule of) waiting for twelve years applies to all missing persons, except a father.*

In the *Grihya-káriká*, however, it is laid down as follows :—" It is said that the obsequies of a missing person in the first period of life, should be performed after the lapse of twenty years, of one of middle age after fifteen years, and of a person in the last period of life (above 75 years) after 12 years (from the day of his or her disappearance).*

Annotations.

8. *Játú-karna*, quoted in the *Nirnoyámrita*, declares,—"One whose father is absent, and of whom there is no intelligence, must, after fifteen years, make an image of him, and perform his funeral rites in the prescribed form."—The *Grihya-káriká* is cited in the *Nirnoya-sindhu* for the following text : "If he be in the first period of life, the rites are directed after twenty years ; if he be of middle age, after fifteen ; but, in the latter period of life, after twelve. His sons having performed three *chándráyana* fasts, or thirty austere ones, must burn an image of him made of *kusha* grass, and observe the mourning and other rites." Remarks by Mr. Colebrooke.—See *Stra.* H. L., Vol. II, p. 237.

* *Nirnoya-sindhu*, Sanskrit, Chapter III, page 24 of the Section on Impurity.

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Conclusion. Of the above doctrines, *that* which is laid down in the *Grihya-káriká* is consistent with reason and therefore preferable in practice according to the ordinances of YÁJNAVALKYA and VRIHASPATI, which are as follows :—"If two texts differ, reason (or that which it best supports) must in practice prevail."* "A decision must not be made solely by having recourse to the letter of the written codes: since, if no decision were made according to the reason of the law, (*yukti*)† there might be a failure of justice."‡

Remark. But RAGHU-NANDANA, who is the highest Bengal authority in the matter of rituals,§ having in his *Tithi-tattwa*, fixed the date of the death of missing persons according to the text of YAMA or JAMA, above quoted, it has been the practice of the Hindús of this country to account and treat missing persons as dead immediately on the expiry of twelve years from the date of the last trustworthy tidings of them without any consideration of age or relationship. Accordingly,—

Vyavasthá. **9. In Bengal proper, the death-rites of the missing persons are performed on the expiry of twelve years without any consideration as to their age or relationship.**

Vide Precedents, pages 6, 7, 8, 10.

Annotations.

9. The law has assigned various periods of absence, inferring the conclusion, according to the age of the person in question at the time of his departure, the lowest being twelve years ; at the expiration of which, without intelligence of him having been received, the heir is entitled to assume the succession, keeping certain fasts, then burning an image of his ancestor made of *kusa*, and finally performing for him, in the prescribed form, his funeral rites.—*Stra.* H. L., Vol. I, page 131.

9. Sir W. Macnaghten says,—"The fact of the ancestor being missing for a period exceeding twelve years, constitutes a legal title to succession on the part of the heirs. This doctrine was recognized in a case decided by the Sudder Dewany Adawlut, on the 25th of

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* YÁJNAVALKYA. See Colebrooke's Digest, Vol. III, p. 505.

† Or according to immemorial usage; for, the word *Yukti* admits both senses. *Ibid.*, Vol. II, p. 128 : Note.

‡ VRIHASPATI. See *Ibid.*, and Macn. H. L., Vol. II, p. 102.

§ See the Preface.

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10. But if a missing person returning after the lapse of the period allowed for his re-appearance has performed the expiatory penance prescribed by the *Shástra*, then he is not to be treated as dead, but to be restored to the rights of the living.* *Vyavasthá.*

Thus the funeral obsequies having been performed by mistake, should the man, (so) dead, ever return, (then) let him perform the rite or sacrifice (called) '*Áyushmatí*,' and resume (the performance of sacrifice on) fire.—*Chhándoga-parishishta.* Authority.

"The person, whose funeral obsequies have been performed upon his death being heard of, should perform expiation (*j*) according to the *Shástra*, and resume (the performance of sacrifice on) fire." "If he (the missing person) return alive, let (his kin) immerse him in a vessel full of clarified butter, (then) taking him up, let them cause him to be bathed, and his initiatory ceremonies, &c., to be performed. Let his religious rites, which take twelve days or three nights to be completed, be performed: (next,) let him perform ablutions and re-marry his wife, or another (girl) in her default. Having consecrated the sacrificial fire, as ordained, let him perform the *Vrátyashtoma* sacrifice or rite. And repairing to mountains, or hills, *there* let him perform the *Áyushmatí yága* by offering a beast to Authority.

Annotations.

April 1820: Reports, Vol. III, p. 28, wherein it was determined that twelve years should be allowed for the re-appearance of a missing person, after which his death will be presumed: but some authorities maintain, that the period varies with reference to the age of the missing person." See Note to Case 7, Vol. II, p. 9.†—*Macn.* H. L., Vol. I, p. 2.

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* There is a case in East's Notes (No. 85,) in which the Pundits declared that "he who has absented himself for the period of twelve years, and of whom no intelligence has been received during that time, must be considered as certainly dead; should he even return after that time, he has forfeited the rights of the living." This being a Bengal case, the period of twelve years must have been declared for the missing person's re-appearance without reference to his age and relation. But as to his forfeiting the rights of the living it must have been declared in consideration of his not performing the expiatory penance.

† This note is to be found at page 39 of the Precedents.

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*Indra**, and *Agni*† ; and afterwards let him perform also some other sacrifices or rites as he may choose."—VRIDDHA MANU cited in the *Hemádri*. See *Bhavishya-purána*, and *Nirnoya-sindhu*, (Sans.) pp. 415 & 416, in which also the above texts are cited.

(*j*) Here by 'expiation' must be understood the re-performance of the initiatory ceremonies from *Játa-karma* to marriage.—*Hemádri*.

Vyavasthá. **11.** As respects the missing person who is not an *agni-hotrí*,‡ if he return after his funeral obsequies were performed by mistake, he should perform the *Swastyana*,§ but if he return after the mere receipt of the intelligence of his death, then he should perform the *Charu-homa*.

Authority. But with respect to the (missing) person who is not an *agni-hotrí*,‡ common *swastayanu*, the worship of HARI‖ and so forth, should be performed.—*Chhándoga-parishishta*.

Authority. But if the (missing) person is not an *agni-hotrí*,‡ he should perform the *Charu-homa* upon the mere receipt of intelligence of his death.—*Áshwaláyana*.

Vyavasthá. **12.** Out-casts or persons degraded for sin, and persons assuming an order or condition of life other than that of householder are not, however, considered dead as to the property acquired by them after their degradation or assumption of another order. (See Exclusion from Inheritance.)

Vide Precedents, page 11.

Annotations.

12. In either case, whether of the out-cast or *devotee*, partition attaches only upon property possessed by him at the time, not upon what may subsequently devolve or be acquired.—*Stra*. H. L., Vol. I, page 187.

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* One of the Hindú deities, who presides over the atmosphere and is regarded as the Sovereign of the (subordinate) deities.

† By '*Agni*' is here meant the Deity who is the regent of fire.

‡ *Agni-hotrí*, composed of *agni* (fire) and *hotrí* (*sacrificer*), signifies one who maintains sacrificial fire and performs sacrifice on it.

§ The aversion of evil by the recitation of *Mantras*. The benediction of a *Bráhmana* after presentation of offerings.

‖ VISHNU, one of the three principal *Hindú* deities, and the preserver of the world.

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CHAPTER II.

ON SUCCESSION OF THE BEGOTTEN SON, SON'S SON, AND SON'S SON'S SON.

When a man's right of property ceases by death, natural or civil,* or voluntary abandonment,†—

13. The right devolves on his son(*a*). *Vyavasthá.*

Vide Precedents, pages 13—16, 18, 19.

(*a*) Here by the term "son" is meant only the *ourasa* and *Dattaka*, the other descriptions of sons being obsolete in the present (*Kali*) age. See post page 18. Explanation.

The *Dattaka* will be defined and treated of in the book on Adoption.

'*Ourasa*' is the issue of the *uras*, or breast, (whence of the body,) and born of a legally married wife (*patní*). Thus MANU:—"Him, whom a man begets on his own wife legally married, let him know to be the *Ourasa* son: first in rank." (Ch. 9, *v.* 186.) *Ourasa*, however, is of two kinds—1, Born of a wife of *equal class*, and, 2, born of a wife of unequal class. But in the present (*Kali*) age the marriage with a damsel of an unequal class having been prohibited, (see the Chapter on Marriage), and consequently

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Annotations.

13. Sir William Macnaghten, who is followed by Mr. Elberling, treats of the son's succession in these terms:—"According to the Hindú law of inheritance, as it at present exists, all legitimate sons, living in a state of union with their father at the time of his death, succeed equally to his property, real and personal, ancestral and acquired." (Vol. I, p. 17.) This, however, is not quite correct, because;—firstly, the *Dattaka* is also held to be a legitimate son, but he does not succeed *equally* with the *Ourasa* son of his adoptive father; secondly, the sons succeed, as heirs to the patrimony, not only at the time of their father's natural death, but also at the time of his civil death and voluntary abandonment, (*ante*, p. 7); and thirdly, the circumstance of a son's living separate from his father, does not exclude him from the heritage where he has not already received his portion or somewhat in lieu or in satisfaction thereof. This much is apparent from a precedent quoted by the learned compiler himself. See his work on Hindú Law, Vol. I, p. 2, and Vol. II, Chap. I, Case 5.

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* See *ante*, pp. 5—8, and Precedents, pp. 1, 2, 6—8, 10.

† See *ante*, p. 7, and Precedents, pp. 8—10, 13.

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the son born of such a wife not being entitled to inherit, now by the term '*Ourasa*' we must understand only the son begotten by the man himself on his legally married wife of *equal class*. RAGHU-NANDANA, it is clear, has quoted in his *Udváha-tattwa*, only BOUDHÁYANA's text: (*Viz.*, "A son who was begotten by a man on his wedded wife of *equal class*, let him know to be *Ourasa* son,") because he found it expressive of the son who is now considered to be '*Ourasa*.'

Authority. BOUDHÁYANA :—Male issue of the body being in existence the wealth goes to them* (cited in the *Dáya-bhága, Vivádabhangárnava, Vira-mitrodaya* and *Vyavahára-mayúkha*).

Authority Since the sons and other male descendants produce great spiritual benefit to their father or other ancestor from the moment of their birth,† and they present the oblations at the *Parva* to their deceased father, the proprietary right of the sons and the rest is obtained as already inferable from reasoning; because the property devolving upon sons and the rest benefits the deceased, and since there can be no other purpose of speaking of the various benefits derived from sons and the rest, while treating of inheritance, it appears to be a doctrine to which MANU assents, that the right of succession is grounded solely on the benefits conferred. It clearly appears that *the estate of the deceased should go first to the son, grandson and great-grandson* (in the male line), and this is reasonable.—*Dá. Bhá.*, Chap. XI, Sect. i, Paras. 31—33.

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* The original of this text is—"*Satshwangajeshu tad-gámi hyartho bhavati*," of which the above is an accurate translation. Mr. Colebrooke, however, has made two different translations of the text in question: the one contained in his so-called Digest (Vol. II, p. 520) runs thus :—"Male issue by males *as far as the third degree* being left, the estate must go to them;" and the other is to be found in his translation of the *Dáya-bhâga* (Chap. IV, Sect. ii, § 21) which is as follows :—" Male issue of the body being left, the property must go to them."

† MANU and VISHNU say :—"Since a son delivers (*tráyate*) his father from the hell called '*put*,' therefore he is named '*put-tra*' by the Self-existent himself." (MANU 9, 138; VISHNU 15·43.) So says also HÁRÍTA :-" Certain hells are named *put* and *chhinna-tantu*, a son is therefore called '*put-tra*,' because he delivers his father from those regions of horror." In like manner, SANKHA and LIKHITA declare :—"A father is exonerated in his lifetime from the debt to his own ancestors, upon seeing the countenance of a (living) son : he becomes entitled to heaven by the birth of his son, and makes his own debt devolve on him. The sacrificial hearth, the three *Vedas*, and sacrifices rewarded with ample gratuities, have not the sixteenth part of the efficacy of the birth of an eldest son." Thus also MANU, SANKHA, LIKHITA, VISHNU, VASHISHTHA and HÁRÍTA : "By a son, a man conquers worlds ; by a son's son, he enjoys immortality ; and, afterwards, by the son of a grandson, he reaches the solar abode." (MANU 9·137 ; VASHISHTHA 17·5 ; VISHNU 15.45.) YÁJNAVALKYA likewise says :—"The continuance of race and attainment of heaven depend on a son, grandson and great-grandson." (I. 78.)

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First, his legitimate son succeeds in conformity with this text:—"After the death of the father and mother, the brethren being assembled must divide equally the paternal estate; for they have not power over it, while their parents live,"* and other texts of a like import which declare the right of the son to succeed on the decease of the father.—*Dá. Kra. Sang.*, Chap. I, Sect. i, § 2. Authority.

This doctrine [that inheritance is deducible from services rendered,†] must be admitted to have the assent of MANU and other sages: for there can be no other purpose of propounding, under the head of inheritance, the superior benefits derived from sons and the rest: and the exoneration of the father from debt is stated as a reason for the son's inheriting: ("By the eldest son a man is exonerated from debt to his ancestors; therefore that son is entitled to take the heritage.‡") Redemption also is exhibited as a cause of succession to property: ("Even the son of a daughter delivers him in the next world like the son of a son"§) and there is no other reason for the equal right of inheritance of three descendants, the son and the rest, besides their deliverance [of their ancestors;] and the passage, "To three ancestors must libations of water be made, &c."‖ would be unnecessary [if such were not the purpose;¶] and the exclusion of persons impotent, degraded, and blind from their birth and so forth, is apposite rule as founded upon their rendering no services; [but not so as grounded on the mere letter of the law:¶] and it is troublesome to establish an assumed precept for debarring those before whom an heir intervenes; [as must be done upon any other supposition] and it is reasonable, that the wealth, which a man has acquired, should be made beneficial to him by appropriating it according to the degree in which services are rendered to him.—This doctrine, as illustrated by irreproachable UDYOTA,** should be respected by the wise.—*Dá. Bhá.*, Chap. XI, Sect. vi, § 31. Authority.

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* MANU, Chap. IX, *v.* 104.

† SRÍ-KRISHNA.

‡ *Dá. Bhá.*, Chap. XI, Sect. i, § 32.

§ MANU, Chap. IV, *v.* 139.

‖ *Dá. Bhá.*, Chap. XI, Sect. i, § 7.

¶ SRÍ-KRISHNA.

** "The irreproachable UDYOTA." It is not agreed who is the author here cited by JÍMÚTA-VÁHANA. The commentator CHÚDÁMANI says 'some author or compiler so named.' MAHESHWARA retains the name exhibited in the text and calls him 'UDYOTA.' But SRÍ-KRISHNA hints, that his appellation is 'DIVÁKARA.' While ACHYUTA interprets the phrase as commendatory of an unnamed author; and RAGHU-NANDANA, or the commentator who has assumed his designation, intimates, that the author himself has here delivered his own doctrine.—Colebrooke's Annotation to para. 9, Chap. II, of the *Dáya-bhága*.

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Vyavasthá. **14. If there be many sons of the same description (*d*), they inherit *equally* (*e*) as well as *simultaneously*.**

Vide Precedents, pages 13 and 16.

Explanation. (*d*) By the expression "*of the same description*" is meant that the sons should be either '*ourasa*,' or '*dattaka*,' besides which no filiation of other descriptions of sons is admitted at the present (*Kali*) age, at least in Bengal proper. But if there be a *dattaka* son adopted before the birth of an *ourasa* son, the former, though inheriting *simultaneously* with the latter, will get only one-third of the portion of the *ourasa* son.*

Authority. VRIHASPATI:—Sons inherit the paternal estate, the shares (*f*) of all are equal.

Explanation. (*f*) 'Shares'—here mean the shares of both assets and debts.—*Smri. Chan.*, Chap. II, Sect. ii, cl. 16.

Authority. MANU:—After the death (*g*) of the father and (*h*) mother, the brothers being assembled, may equally (*e*)† divide among themselves the paternal (and maternal) estate; but they have no ownership over it while their parents live.—Chap. IX, *v.* 104.

Explanation. (*e*) Here the term '*equally*' indicates that their title is *equal*; that is, a deduction of a twentieth part, &c., is allowed by other brothers, through affection and to preserve due respect, because elder brothers are venerable: such deduction concerns, however, elder brothers who are endued with virtue. But as persons of the present day entertain not great veneration (for their elder brothers), and as elder brothers deserving of deducted allotments are (now) rare, equal distribution is alone seen in the world.—*Coleb.* Dig., Vol. II, p. 521, and *Dá. Bhá.*, Chap. III, Sect. ii, § 27.

Explanation. (*g*) '*After the death*,' that is, after the extinction of right.—*Srí-krishnas'* Commentary on the *Dáya-bhága*.

Explanation. (*h*) By the insertion of the copulative conjunction '*and*,' the consummation of both their deaths is not required. Thus SANGRAHAKÁRA:—" A partition of the father's wealth may take place even whilst the mother lives, for this reason, that, without her

* See the book on Adoption.

† The original (*Sanskrit*) of the term 'equally' is '*Samam*' which is omitted by Sir William Jones in his translation of the above text.

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husband, the mother does not, from her independence, derive ownership. A partition of the mother's wealth also may take place in like manner, while the father is alive; for, if there be issue, the lord (of the wife) is not lord of the wife's wealth."*

15. In default of the son, the son's son inherits; failing him, the great-grandson in the male line.† *Vyavasthá.*

Vide Precedents, pages 13, 15, 16, 18.

16. The grandson whose father is dead, and the great-grandson, whose father and grandfather are dead, are entitled to inherit simultaneously as well as equally with the late proprietor's surviving son.‡ *Vyavasthá.*

Vide Precedents, pages 13, 16, 18.

Because they equally confer benefits on the deceased by presentation of the oblation cake at the *Párvana Shráddha*(*i*). **Reason.**

In default of the son, the grandson takes the inheritance; and failing him, the great-grandson. But a grandson whose father is dead, and the great-grandson whose father and grandfather are dead, participate equally in the inheritance with the son, for they without distinction confer equal benefits on the deceased owner of the property by **Authority.**

Annotations.

14, 15. The right of performing the funeral obsequies is settled according to the following authority :—"The son, the son of a son, the son of a grandson;" hence their right of inheritance, which is similar to the right of performing the funeral obsequies, is likewise established.—First, the son; on failure of him, the grandson; in his default, the great-grandson [inherits].—*Vi. Chi.*, pp. 289 and 299.

In default of sons, grandsons inherit, in which case they take *per stirpes*, the sons, however numerous, of one son, taking no more than the sons, however few, of another son.—Macn. H. L., Vol. I, page 18.

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* Cited in the *Smriti-chandriká*, Chapter I, clauses 12, 15—17;—*Vyavahára-mayúkha*, Chap. IV, Sect. iv, § 1;—and *Víra-mitrodoya.*

† *Vide Dá. Ta.* Sans., pp. 11, 51;—*Dá. Bhá.*, Chap. III, Sect. i, para. 18, Sect. ii, para. 21 and 23, Chap. XI, Sect. vi, § 29,—*Coleb.* Dig., Vol. III, pp. 9, 10;—Elb.Inh., Sect. 158, p. 70.

‡ *Vide* Coleb. *Dá. Bhá.*, pp. 60 & 221;—*Coleb.* Dig., Vol. III, p. 9; and Elb. In., Sect. 158, p. 70

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the presentation to him of funeral offerings at solemn obsequies (*Párvana*).—*Dá. Kra. Sang.*, Chap. I, Sect. i, § 3.

Explanation. (*i*) *Párvana Shráddha* is the offering of a double set of oblations at the *parva*, viz., three cakes to the father, paternal grandfather, and great-grandfather, and three to the maternal grandfather, his father and grandfather; and the remnants of each set to the three remoter ancestors of each line.

Vyavasthá. **17. If there be many grandsons and great-grandsons they inherit *per stirpes*, and not *per capita*.* See Partition.**

Vide Precedents, pages 13, 15, 18.

Annotations.

16, 17. The right of representation is also admitted, as far as the great-grandson; and the grandson and great-grandson, the father of the one and the father and grandfather of the other being dead, will take equal shares with their uncle and grand-uncle respectively. Indeed, the term '*put-tra*' or 'son' has been held to signify, in its strict acceptation, (also) a grandson and great-grandson.—Macn. H. L., Vol. I, p. 17.

The collective term "issue" comprehending not only as many sons as a man may chance to leave behind him, but sons' sons also, and sons of the latter or great-grandsons,—if the son have died in the lifetime of his father, leaving a son, and that son also die leaving one, and then the grandson die, the great-grandson succeeds, as his grandfather would have done, had he survived.—*Stra.* H. L., Vol. I, page 124.

17. In default of sons and grandsons, the great-grandsons inherit, in which case, they also take *per stirpes*, the sons, however numerous, of one grandson, taking no more than the sons, however few, of another grandson. They will take the shares to which their respective fathers would have been entitled, had they survived.—Macn. H. L., Vol. I, p. 18.

A son, dying in the lifetime of the father, leaving sons, representation takes place, proceeding as far as great-grandsons, upon the ground of their conferring, by performance of funeral obsequies, equal benefit on the ancestor; the key (as observed by Sir William Jones) to the whole Indian law of inheritance.—*Stra.* H. L., Vol. I, (1st Ed.) p. 116.

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* *Vide Sri-krishna's* comment on the *Dáya-bhága*, Sans., pp. 37, 38; Coleb. *Dá. Bhá.*, Ch. III, Sect. i, paras. 21, 23; *Coleb.* Dig., Vol. III, pp. 6—9; and Elb. In., Sects. 158 &162.

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As in virtue of his offering the oblation-cake at the *parva* (*j*), the son becomes entitled to inherit his father's estate, so are his (the son's) sons, on the extinction of his right (by death, &c., pp. 8—10) in like manner entitled to inherit (notwithstanding the existence of their paternal uncle,) whatever portion of the grandfather's estate was their father's right; for KÁTYÁYANA, quoted in the *Ratnákara*, expressly says:—"Should a son die before partition, his son shall be made a partaker of the estate, provided he had not received from his grandfather property sufficient for his support. He shall receive his father's share from his uncle or his uncle's son; and the same (proportionate) share shall be according to law allotted to all the brothers; or, (if that grandson be also dead) let his son take the share; beyond him (*i. e.*, great-grandson,) lineal succession stops."* If there be many sons of the deceased (son), their father's share only (and no more) should be subdivided and allotted amongst them. In like manner, on the extinction of right of the (late) owner's grandson, his (the latter's) share only shall be taken by his sons (the great-grandsons of the late owner).—*Dáya-tattwa*, Sans., pp. 11 & 51. Authority.

(*j*) "The fourteenth and eighth days of each half lunar month, the full moon and new moon, also the time of the sun's entering on a new zodiacal sign, these, O great king, are (called) *parva*."—*Shráddha-tattwa*. Explanation.

VRIHASPATI:—Their sons of unequal number are declared to take the shares of their respective fathers.† Authority.

The meaning is, where the sons of the deceased fathers are of unequal number, that is, of greater or less number, the sons of each father take the share of their own father only. For example: when one has a single son, another two, and a third many; the only son receives one share in right of his father, the two sons take one share appertaining to their father, and similarly the many sons obtain one share due to their father.† Explanation.

YÁJNAVALKYA:—Among the issue of different fathers, the allotment of shares is according to the fathers.—2. 121. Authority.

The purport of the text, however, is this: If there be a numerous issue of one brother, and a few sons of another, then the allotment of shares is according to the fathers.—*Dá. Bhá.*, Chap. III, Sect. ii, § 23. Explanation.

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* *Vide Coleb.* Dig., Vol. III, pp. 7, 8, and 82; and SRÍ-KRISHNA'S commentary on the *Dáya-bhága*, Sans., pp. 77 and 78.

† *Smriti-chandriká*, Chapter VIII, Clauses 3, 4.

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Illustration. If there be one son living, and sons of another son [who is deceased,] then one share appertains to the surviving son, and the other share goes to the grandsons however numerous, for their interest in the wealth is founded on their relation by birth to their own father, and they have a right to just so much as he would have been entitled to.—*Dá. Bhá.*, Chap. III, Sect. ii, § 21.

Vyavasthá. **18.** But the grandson whose father is living, and great-grandson, whose father and grandfather are living, are not entitled to inherit;* since they do not confer benefit by presentation of the oblation-cake at the *parva.*(*j*).

Authority. But if the father be living, the sons are not entitled to get shares by reason of their having no right to perform the *Párvana Shráddha.*(*i*)—*Dá. Ta.* Sans., p. 11.

Authority. But during the lifetime of their parents, neither the grandson nor the great-grandson is entitled to the inheritance, since they do not confer any benefits on the deceased by the presentation of the funeral offering at solemn obsequies (*Párvana*).—*Dá. Kra. Sang.*, Chap. I, Sect. i, § 4.

Authority. Accordingly [since inheritance is in right of benefits conferred, and the order of succession is regulated by the degree of benefit;†] the equal right of the son, the son's son and son's grandson, is proper: for their equal pretensions are declared in the text:—"By a son a man conquers worlds," &c.,‡ and in other similar passages. They equally present oblations to the deceased. Hence also the grandson and great-grandson, whose fathers are living, do not inherit, for they do not confer benefits, since they are forbidden to celebrate the periodical obsequies by skipping the surviving father; the law providing, that oblations shall not be presented, overpassing a living person. Otherwise these [sons and grandsons, whose fathers are living,§] would have the same right of inheritance with those whose

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* *Vide Dá. Bhá.*, Ch. III, Sect. i, para. 16 & Ch. XI, Sect. vi, para. 29;—*Dá. Ta.* Sans., pp. 11 & 51;—*Coleb.* Dig., Vol. III, pp. 9 and 10.

† SRÍ-KRISHNA.

‡ The remainder of this text is as follows:—

"By a son's son, he enjoys immortality, and, afterwards, by the son of a grandson, he reaches the solar abode."—*Dá. Bhá.*, Chap. I, Sect. i, § 31.

§ ACHYUTA and SRÍ-KRISHNA.

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fathers are deceased. Or the son alone would inherit as the nearest of kin in the order of birth, to the exclusion of the son's son and son's grandson. Neither is there any express text declaratory of the equal rights of the three descendants, son, grandson and great-grandson. Therefore it must be inferred that, the parity in their right of inheritance arises from the equal benefits conferred by them.—*Dá. Bhá.*, Chap. XI, Sect. vi, § 29.

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19. The son begotten by a man of the *Shúdra* tribe on his female slave, or other unmarried *Shúdra* woman, or on the female slave of his slave, may, by the father's choice, take a share equal to that of a son begotten on a wedded wife; he is entitled to a moiety of such share upon his father's death, also upon the father leaving a daughter's son. In default of these, such son is entitled to the whole of the father's property.* *Vyavasthá.*

Vide Precedents, pages 16, 17 and 18.

The son of a *Shúdra* by a female slave or other unmarried *Shúdra* woman may share equally with other sons, by consent of the father. Thus†— Authority.

MANU says, "But a son begotten by a man of the servile class on his female slave, or on the female slave of his male slave(*k*), may take a share of the heritage, if permitted: thus is the law established.†—Chap. IX, *v.* 179. Authority.

Annotations.

19. Among the sons of the *Shúdra* tribe, an illegitimate son by a slave girl takes with his legitimate brothers a half share; and where there are no sons (including son's sons and grandsons,) but only the son of a daughter, he is considered as co-heir, and takes an equal share.—Macn. H. L., Vol. I, p. 18.

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* See the Chapter on Marriage.

† *Dá. Bhá.*, Chap. IX, § 29.

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Explanation. The son of a *Shúdra* by a female made a captive or slave under a standard or the like, or by a female slave belonging to his male slave, if permitted *by his father*, shares equally with the sons by his wedded wife, that is, he obtains a share equal (to that of one of those sons): this is the settled rule of the *Shástra*.—KULLÚKA BHATTA'S Commentary on the above text.

Without such consent, he shall take half a share: as*—

Authority. YÁJNAVALKYA directs:—"Even a son begotten by a *Shúdra* on a female slave, may take a share by the choice of the father; but, if the father be dead, the brethren (*l*) should make him partaker of half a share."(1)*—Chap. II, *v.* 134.

Authority. Begotten on an unmarried woman, and having no brother (*m*), he may take the whole property; provided there be not a daughter's son. So*—

YÁJNAVALKYA ordains:—"One who has no brothers may inherit the whole property for want of daughter's sons."(1)*—Chap. II, *v.* 135.

Authority. But, if there be a daughter's son, he shall share equally with him, for no special provision occurs: and it is fit, that the allotment should be equal; since the one, though born of an unmarried woman, is son of the owner; and the other, though sprung from a married woman, is only his daughter's son.*

Annotations.

(1) VIJNÁNESHWARA's interpretation of the above text of YÁJNAVALKYA is as follows:—The son begotten by a *shúdra* on a female slave, obtains a share by the *father's choice*, or at his pleasure, but, after [the demise of] the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share:—that is, let them give him half [as much as is the amount of one brother's] allotment. However, should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife, nor sons of daughters. But, if there be such, the son of the female slave participates for half a share only.—*Mit.* Inh., Chap. I, Sect. xii, § 3.

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* *Dá. Bhá.*, Chap. IX, § 30, 31.

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(k) On the female slave of his slave.] On the wife of his male slave.*—CHÚDÁMANI. Explanation.

On the unespoused concubine of his male slave.—SRÍ-KRISHNA. Explanation.

(l) The brethren.] The sons by a wedded wife.*—MAHESHWARA. Explanation.

(m) Having no brother.] His father having left no son by a wife.—ACHYUTA. Explanation.

He being born of an unmarried woman, and having no brother born of a wedded wife.*—MAHESHWARA. Explanation.

"The son of a *Shúdra* by a female slave or other *Shúdra* woman not lawfully married, shall, with his father's choice, have an equal share with other sons" (JÍMÚTA-VÁHANA.) Consequently, this is also intimated; if the father said:—"let an equal share be given to this son," then the other sons shall give him an equal allotment when partition takes place. After the death of the father, *if no such will had been declared,* the brethren born of a wife legally married, shall allot him half a share; that is, half of such share as would have been assigned had his mother been legally married. Consequently, a son by a female slave, not superior in class to her *shúdra* master, shall obtain the moiety of a full share. Such is the opinion delivered in the *Mitákshará* and *Ratnákara.* The same legislator propounds the rule when there is no son by a woman lawfully married. —"Should he have no brother, he shall take the whole, unless there be a daughter's son." If there be no son by a woman lawfully married, nor a daughter's son, the son of a female slave shall take the whole estate of a *shúdra* father. Such is the exposition delivered in the *Ratnákara.* MISRA explains the text similarly.—*Coleb.* Dig., Vol. III, pp. 143, 144. Authority.

From the specification "*by a Shúdra,*" in the foregoing passages, it is clear that—

20. A son begotten by a *Bráhmana, Kshatriya* or *Voishya* on a female slave does not obtain a share, *Vyavasthá.*

Annotations.

20. From the mention of a *shúdra* in this place [it follows that] the son begotten by a man of a regenerate tribe on a female slave does not obtain a share even by the father's choice, nor the whole estate after his demise. But if he be docile, he receives a simple maintenance.—*Mit.* Inh., Chap. I, Sect. xii, § 3.

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* *Dá. Bhá.*, Chap. IX, § 30, 31 Annotations.

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even by the father's choice; neither, after the death of the father, will he get half a share; nor will he participate for half a share in the case of there being a daughter's son, nor the whole estate on failure of legitimate sons and other heirs, unless there be a local or family custom in his favor. But if he be virtuous and obedient, he will receive a provision for his maintenance.

Vide Precedents, pages 16 and 18, also *Vyavasthá-Chandriká*, Vol. I, part i, p. 86, part ii, pp. 199—208, and Vol. II, part ii, pp. 574, 575 and 576.

Authority. MANU:—The son of a *Bráhmana*, a *Kshatriya*, or a *Voishya*, by a woman of the *Shúdra* class, shall inherit no part of the estate, (unless he be virtuous); nor jointly with other sons, (unless his mother was lawfully married:)* whatever his father may give him, let that be his own.—Chap. IV, *v.* 155.

Authority. MANU:—A son, begotten through lust on a *Shúdra* by a man of the priestly class, is even as a corpse, though alive, and is thence called in law "a living corpse."—Chap. IX, *v.* 178.

Authority. VRIHASPATI:—A virtuous and obedient son, born of a *Shúdra* woman unto a man who leaves no legitimate offspring, shall take a *provision for his* maintenance, and the kinsmen shall inherit the remainder of the estate.†—See *Vi. Chi.*, p. 274.

Authority. GOUTAMA:—A son by a *Shúdra* woman, born unto a man who leaves no (legitimate) offspring, shall, if he be strictly obedient (like a pupil), receive a provision for his maintenance.—See *Vyav. Mayú.*, Chap. IV, Sect. iv, § 30.

Authority. RAGHU-NANDANA in his *Shuddhi-tattwa* quotes the foregoing text of YÁJNAVALKYA, and says,—"the rule laid down in the above text is observed only among the *Shúdras*, not by the other castes.

It has also been determined that—

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* The words within parenthesis are not in the text itself, but seem to have been added from KULLÚKA BHATTA'S commentary.

† This rule relates to the child of an unmarried *Shúdra*; for the text is laid down in the section treating of an unmarried woman.—*Vi. Chi.*, p. 274.

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21. The son begotten by a *Shúdra* on a kept woman with whom carnal connection is not incestuous, is also entitled to inherit in the above manner; but such a son of a twice-born man is entitled only to maintenance.* *Vyavasthá.*

Vide Precedents, pages 16,17, and *Vyavasthá-chandriká*, Vol. I, Part ii, pp. 210—217.

The above must be on the woman's being considered to be a slave either of the description "I am thine," or "as one maintained in consideration of service (*bhakta*)." See the texts of MANU and NÁRADA cited herein below.

Descriptions of the different kinds of slaves are as follow:—

MANU:—There are servants of seven sorts; one, made captive under a standard *or in a battle;* one, maintained in consideration of service; one, born of a female slave in the house; one, sold, or given, or inherited from ancestors; and one, enslaved by way of punishment *on his inability to pay a large fine.*—Chap. VIII, *v.* 415. Slaves.

NÁRADA:—"One, born (of a female slave) in the house of her master; one, bought; one, received (by donation); one, inherited; one, maintained in a famine; one, pledged by a former master; one, relieved from a great debt; one, made captive in war; a slave, won in a stake; one, who has offered himself in this form, "I am thine;" an apostate from religious mendicity; a slave for a stipulated time; one, maintained in consideration of service; a slave, for the sake of his bride; and one, self-sold, are fifteen slaves declared by law."*—*Dá. Kra. Sang.*, Chap. XII, Sect. i, § 3. Slaves.

KÁTYÁYANA:—A free woman or one who is not a slave (of the same master); for this word '*a-dásí*,' may bare Slaves.

Annotations.

21. Issue by a concubine is described in the law as son by a female slave, or by a *Shúdra* woman. If the father were a *Shúdra*, he might have allotted a share to his illegitimate son. *Mit.* on In., Ch. I, Sect. xii. And the obligation of affording him the means of subsistence is declared in passages quoted in JAGAN-NÁTHA'S Digest, Vol. III, p. 170.—*Colebrooke's* opinion. *Stra.* H. L., Vol. II, (F. E.) p. 198.

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* Vide *Vyavahára-mayúkha*, Chap. X, § 5.

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either sense, becoming the bride of a slave, also becomes a slave [to her husband's owner], for her husband is her lord, that lord is subject to a master.—See *Vyav. Mayú.*, Chap. X, § 11.

The word slave, used throughout on this subject, being not specially confined to the masculine gender, must therefore be understood as affecting all rules also for female slaves.—*Vyav. Mayú.*, Chap. X, § 8.

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CHAPTER III.

ON SUCCESSION TO THE PROPERTY OF A MAN WHO DIED LEAVING NO SON, SON'S SON, AND SON'S SON'S SON.

SECTION I.

ON THE WIDOW'S RIGHT OF SUCCESSION.

22. In default of the son, son's son, and son's son's son of the late owner, his widow (*patní*) succeeds to his estate.* *Vyavasthá.*

Vide Precedents, pages 20—24, 32—49, 147—150.

YÁJNAVALKYA:—The wife and daughters, also both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow-student: on failure of the first of these, the next in order is the heir to the estate of one who departed for heaven (*a*) leaving no son (*b*). This rule extends to all classes. Authority.

Thus affirming the right of the last mentioned on failure of the preceding, the sage (YÁJNAVALKYA) propounds the succession of the widow in preference to all the other heirs.—*Dáya-bhága*, Chap. XI, Sect. i, § 4. Authority.

(*a*) "Departed for heaven," that is dead; which indicates also degraded or fallen from sin, and the rest (see *ante*, pp. 8, 9).—SRÍ-KRISHNA's Commentary on the *Dáya-bhága*, Sans., p. 168. Explanation.

(*b*) The term "son" extends to the great-grandson: and that "leaving no son" implies failure of the son, son's son, and great- Explanation.

Annotations.

22. In default of sons, grandsons and great-grandsons in the male line, the inheritance descends lineally no farther, and the widow inherits according to the law current in Bengal, whether her late husband was separated or was living as a member of an undivided family.—Macn. H. L., Vol. I, p. 19.

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* *Vide Dá. Kra. Sang.*, Ch. I, Sect. ii;—Coleb. *Dá. Bhá.*, Ch. XI, Sect. i, paras. 3 and 31;—*Dá. Ta.*, Sans., pp. 49, 52;—*Coleb.* Dig., Vol. III, p. 457; and Elb. In., Sect. 163, p. 72.

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grandson (in the male line); for these are equally givers of oblations at the *parva*.* And it is for this reason that BOUDHÁYANA, having previously referred to the son, grandson, and great-grandson, says:—"Male issue in the male line being left, the estate must go to them."—*Dá. Ta.*, Sans., p. 49. *Vide Dhá. Bhá.*, Chap. XI, Sect. i, § 34.

Authority. VISHNU:—"The wealth of him, who leaves no son, goes to his wife (*patní*); on failure of her, it devolves on daughters; if there be none, it belongs to the father; if he be dead, it appertains to the mother; on failure of her, it goes to the brothers; after them, it descends to the brother's sons; if none exist, it passes to the kinsmen (*bandhu*); in their default, it devolves on distant kinsmen, (*sakulya*); failing them, it belongs to the pupil; on failure of him, it comes to the fellow-student: and for want of all those heirs, the property escheats to the king, excepting the wealth of a *Bráhmana*."—*Dá. Bhá.*, Chap. XI, Sect. i, § 5.

Authority. VRIHAT MANU:—The widow (*patní*) of a sonless man keeping unsullied her husband's bed (*c*), and persevering in religious observances (*d*), shall alone present to him the oblation-cake, and obtain (his) entire share (*e*).—*Ibid.*, § 7.

Explanation. (*c*) Keeping unsullied her husband's bed.] Not allowing any other man to have access to her husband's bed: that is, being chaste.—SRÍ-KRISHNA'S Commentary on the *Dáyabhága*, Sans., p. 167.

Explanation. (*d*) "Persevering in religious observances," that is, devoted to the performance of religious acts beneficial to her husband's soul in the next world.—*Ibid.*, p. 169.

Explanation. (*e*) The phrase 'obtain entire share' means that the wife shall obtain her husband's entire share, not that she shall obtain her own entire share.—*Dá. Bhá.*, Ch. XI, Sect. i, § 8.

Explanation. (*e*) 'Entire share'—that is, the whole share of her husband, and not a portion adequate to her maintenance.—*Dá. Ta.*, Sans., page 58.

Authority. On failure of the heirs down to the son's grandson, the wife, being inferior in pretensions to sons and the rest, because she performs acts spiritually beneficial to her husband from the date of her widowhood (and not like them from the moment of their birth), succeeds to the estate in their default. Thus VYÁSA says:—"After the death of her husband,

* See *ante*, page 21.

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let a virtuous woman observe the duty of continence and let her daily, after the purification of the bath, present, from the joined palms of her hand, water mixed with *til* (sesamum) to the *manes* of her husband. Let her day by day perform with devotion the worship of the Gods, and the adoration of VISHNU, practising constant abstemiousness. She should give alms to the chief of the venerable for increase of holiness, and keep the various fasts which are commanded by sacred ordinances. A woman who is assiduous in the performance of duties conveys her husband, though abiding in another world, and herself, to a region of bliss." Since by these and other passages it is declared, that 'the wife rescues her husband from hell; and since a woman, doing improper acts through indigence, causes her husband to fall (to a region of horror); for they share the fruits of virtue and vice; therefore, the property devolving on her is for the benefit of the former owner: and the wife's succession is consequently proper."—*Dá. Bhá.*, Ch. XI, Sect. i, § 43,44.

Remark.

The author of *Viváda-bhangárnava* puts this question: "Since a woman has not yet performed the duties of widowhood and the like, how can she have a title to inheritance *immediately* after the death of her husband?" and himself answers it, thus: "She has an immediate title, because she is disposed to perform those duties; but afterwards if her propensities happen to change, she forfeits the right which she had fully possessed."* In HÁRÍTA's text ("A woman widowed and young is untractable; but separate property must always be given to women, that they pass their destined life,") young is mentioned as indicating the possibility of adultery. By youth that age is not strictly meant, for, a woman, though young, who is known to be well-disposed, has the right of inheritance by universal consent. By the term 'untractable' is suggested the neglect of the duties of widowhood.†—See *Coleb.* Dig., Vol. III, p. 479.

* This, however, is not quite correct, for, the hereitable right once vested in a woman is not divested unless she commit such an act or acts of impiety or immorality as to cause her degradation or excommunication by loss of caste.—See Daughter's Succession and the Chapter on Exclusion from Inheritance.

† The duties of widowhood are prescribed in the following texts, cited in the *Ratnákara*, as also in the above text of VYÁSA :—

Let her emaciate her body, by living voluntarily on pure flowers, roots and fruits; but let her not, when her lord is deceased, even pronounce the name of another man. Let her continue till death forgiving all injuries, performing harsh duties, avoiding every sensual pleasure, and practising the incomparable rules of virtue, which have been followed by such women as were devoted to one only husband. Many thousands of *Bráhmanas* having avoided sensuality from their early youth, and having left no issue in

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Authority. VRIHASPATI:—In the Scripture(*f*) and in the code of law(*g*), as well as in popular usage (*h*), a wife is declared by the wise to be half the body (of her husband,) equally sharing the fruit of pure and impure acts. Of him, whose wife is not dead, half the body survives. How then should another take his property while half his person is alive?* Let the

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their families, have ascended (nevertheless) to heaven. And like those abstemious men, a virtuous wife ascends to heaven, though she have no child, if, after the decease of her lord, she devote herself to pious austerity. But a widow who, from a wish to bear children, slights her (deceased) husband (by marrying again), brings disgrace on herself here below, and shall be excluded from the seat of her lord.—MANU, Ch. V, *vs.* 157—161.

Let her continue, as long as she lives, performing austere duties, avoiding every sensual pleasure, and cheerfully practising those rules of virtue which have been followed by such women as were devoted to one (only husband). Neither in the *Vedas*, nor in the sacred code, is religious seclusion allowed to a woman: her own duties, practised with a husband of equal class, are indeed her religious rites: this is the settled rule. Eighty-eight thousand holy sages of the sacerdotal class, superior to sensual appetites, and having left no male issue, have ascended (nevertheless) to heaven. Like them, a damsel, becoming a widow, and devoting herself to pious austerity, shall attain heaven though she have no son: this, MANU, sprung from the Self-existent, has declared.—YAMA.

After the death of her husband, a wife must practise austerities, or ascend (the pile) after him.—VISHNU.

Leaving her husband's favourite abode, keeping her tongue, hands, feet and (other) organs in subjection, strict in her conduct, all day mourning her husband, with harsh duties, devotion, and fasts to the end of her life, a widow victoriously gains her husband's abode, and repeatedly acquires the same mansion with her lord, as is thus declared: "That faithful woman who practises harsh duties after the death of her lord, cancels all her sins, and acquires the same mansion with her lord."—HÁRÍTA.

A wife is considered as half the body of her husband, equally sharing the fruit of pure and impure acts: whether she ascend (the pile) after him or survive for the benefit of her husband, she is a faithful wife. Strict in austerities and rigid devotion, firm in avoiding sensuality, and ever patient and liberal, a widow attains heaven, even though she have no son.—VRIHASPATI.

Only one meal each day should ever be made (by a widow), not a second repast by any means; and a widowed woman, sleeping on a bedstead, would cause her husband to fall (from a region of joy). She must not again use perfumed substances: but daily make offerings for her husband, with *kusa*-grass, *til*, and water. In the months of *Voishákha*, *Kártika*, and *Mágha*, let her observe special fasts, perform ablutions, make gifts, travel to places of pilgrimage, and repeatedly utter the name of VISHNU.—*Smriti.*

Though her husband die guilty of many crimes, if she remain ever firm in virtuous conduct, obsequiously honouring her spiritual parents, and devoting herself to pious austerity after the death of her husband, that faithful widow is exalted to heaven, as equal in virtue to *Arundhati.*—KÁTYÁYANA. See *Colebr.* Dig., Vol. II, pp. 460—465.

* If the wife be half the body of her husband, may she not exclusively take his wealth, although sons, or other male descendants be living? No; for, the Scripture says: "It is a person's own soul which is born to him (or her) as a son." MANU also says: "The husband, after conception by his wife, becomes himself an embryo, and is born a second time here below; for which reason the wife is called *jáyá*, since by her he is born *(jáyate)* again." (Ch. IX, *v.* 8.) So also SANKHA & LIKHITA: "Let a *Bráhmana* take the

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patní of a deceased man, who left no son, take his share, notwithstanding kinsmen, a father, a mother, or uterine brother be present. Dying before her husband, the *pativratá* (*i*) and *sádhwí* (*j*) wife partakes of his consecrated fire; or, if her husband die (before her), she takes his wealth: this is the primeval law. Having taken his movable and immovable property, the precious and the base metals (*k*), the grain, the liquids, and cloths, let her perform the monthly, and the sixth-monthly (*l*) *shráddhas*,* and so forth. With

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hand of a woman equal in class; the bodies of his ancestors are born again of her. Let him figuratively address his own soul in the person of his son; 'Sprung from the several limbs, (especially) from the breast, thou, my soul, art called *'son'*: mayest thou live for a hundred years! For the benefits conferred on parents, thou, my soul, art called son; because thou deliverest (*trá'yase*) from the hell called *'put,'* therefore thou art named son *(put-tra)*." And it appears from these, that a son or other descendant is consubstantial with the father and other ancestor. (See *Coleb.* Dig., Vol. III, p. 459.) He (the son) is (as it were) that very person by whom produced.—BHÁRATA. *Vide Da. Mim.*, Chap. IV, § 13. Further, MANU and VISHNU say: "Since a son delivers *(tráyate)* his father from the hell called '*put*,' therefore he is named *put-tra* by the Self-existent himself." (MANU 9. 138; VISHNU 15. 43.) So says also HÁRÍTA: "Certain hells are named *put* and *chhinna-tantu*, a son is therefore called *put-tra*, because he delivers his father from those regions of horror." In like manner SANKHA and LIKHITA declare: "A father is exonerated in his lifetime from the debt to his own ancestors, upon seeing the countenance of a living son: he becomes entitled to heaven by the birth of his son, and devolves on him his own debt. The sacrificial hearth, the three *vedas*, and sacrifices rewarded with ample gratuities, have not the sixteenth part of the efficacy of the birth of an eldest son." Thus also MANU, SANKHA, LIKHITA, VISHNU, VASHISHTHA and HÁRÍTA: "By a son, a man conquers worlds; by a son's son, he enjoys immortality; and, afterwards, by the son of a grandson, he reaches the solar abode."—(MANU 9. 137; VASHISHTHA 17. 5. VISHNU 15. 45.) YÁJNAVALKYA likewise says: "The continuance of race and attainment of heaven depend on a son, grandson and great-grandson." (1. 78.) *Vide Dá. Bhá.*, Ch. XI, Sect. i, para. 31.

"Thus," says JÍMÚTA-VÁHANA, the highest authority of the Bengal school, "since the sons and other male descendants produce great spiritual benefit to their father or other ancestor from the moment of their birth, and they present the oblation-cake at the *parva* to their deceased father, the proprietary right of sons and the rest is ordained, as already inferrable from reasoning; because the property devolving upon sons and the rest benefits the deceased, and since there can be no other purpose of speaking of the various benefits derived from sons and the rest, while treating of inheritance, it appears to be a doctrine to which MANU assents, that the right of succession is grounded solely on the benefits conferred. It therefore clearly appears that the estate of the deceased should go first to the son, grandson, and great-grandson, and on failure of the son and the rest, the succession devolves on the widow: and this is reasonable."—*Dá. Bhá.*, Ch. XI, Sect. i, pp. 169-170, paras. 31, 32, 33.—*Vide* Precedents, page 108.

* "Let her perform the *shráddhas* in each month, and in the sixth, and so forth:" the text should be so supplied. The *Párvana* or double (properly, triple) set of oblations must not be offered, because women are forbidden to perform this rite. By the word "month" are suggested the *shráddhas* offered in twelve successive months; by the term "sixth" are suggested two *shráddhas* celebrated the day before the expiration of each of the two sixth months of the year; the term "and so forth" includes the first and the anniversary *shráddhas* to be performed yearly; hence she must celebrate no other obsequies."—*Coleb.* Dig., Vol. III, p. 450.

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presents offered to his manes(*m*), and by pious liberality(*n*), let her honor the paternal uncle of her husband, his spiritual parents, and daughter's sons, the children of his sisters, his maternal uncles, and also the old(*o*) and unprotected persons, guests, and females(*p*) [of the family]. Those near or distant kinsmen who become her adversaries or who injure her property, let the king chastise by inflicting on them the punishment of robbery.*

Explanation. (*f*) In Scripture.] In the *Veda* (which says): "She who is a wife (*patní*) is half of her husband's body (*átmanah*) itself. The word '*átmanah*' means of the body.—*Smri. Chan.*, Chap. XI, Sect. i, Clause. 6.

Explanation. (*g*) In the Code of law.] In the *Dharma Shástra* (wherein it is laid down thus): "Of him whose wife drinks wine, half his body sinks. In the case of him, half of whose body has sunk, no expiation is prescribed."—*Ibid.*, Cl. 7.

Explanation. (*h*) In popular practice.] In the *Shástra*, exhibiting the laws sanctioned by popular usage (wherein it is provided): "Which learned will renounce a wife, who is half of the body?"—*Smri. Chan.*, Chap. XI, Sect. i, Cl. 8.

Explanation. (*i*) '*Pati-vratá*' is thus defined by HÁRÍTA:—"She, who suffers pain when her lord endures it, (that is, becomes affected in mind by similar anguish), is cheerful when he is so, in his absence, pines under the anguish of separation, and is squalid, (through neglect of ornament and dress,) and who dies when he expires, (that is, follows him in death,) is considered a *pati-vratá sádhwí*." (Vide *Coleb.* Dig., Vol. III, pp. 462,463.) Here, however, by the term *pati-vratá* is meant the legally married wife who is devoted to the service of her husband, and not she who follows her husband in death, since the right of the latter is extinguished with her death.—SRÍ-KRISHNA'S Commentary on the *Dáya-bhága*, Sanskrit, page 167.

Explanation. (*k*) Base metals.] Brass, lead, and the like.—*Smri. Chan.*, Chap. XI, Sect. i, Cl. 20.

Explanation. (*l*) The expressions "monthly" and "sixth-monthly" are intended to prohibit the performance of the *Párvana shráddha*:† and by the term "so forth" is meant the first *shráddha* and the other *shráddhas* made within the year.—SRÍ-KRISHNA'S Commentary on the *Dáya-bhága*, (Sanskrit) page 167.

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* *Dá. Bhá.*, Chap. XI, Sect. i, para. 2;—*Coleb.* Dig., Vol. VIII, page 458.

† See *ante* page 20.

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(m) With presents offered to the manes (*kavyam*).] With boiled rice offered in honor of departed ancestors.—*Smri. Chan.*, Chap. XI, Sect. i, Cl. 20. Explanation.

(n) By pious liberality (*pūrtam*).] By presents, &c., made for the construction of wells, tanks, and the like.—*Ibid.* Explanation.

(o) The term "old men (*vriddhah*)" signifies also learned men; for it is exhibited in the Dictionary of AMARA among the synonyms of learned.—*Coleb.* Dig., Vol. III, p. 460. Explanation.

(p) Females.] The widows of her husband's sons and the rest. *Ibidem.* See post pages 48, 49. Explanation.

There are texts of sages which are opposed to the widow's right of succession immediately in default of the son, grandson, and great-grandson; others deny her right to succeed at all. But JÍMÚTA-VÁHANA, the founder of the Bengal doctrines, argues in refutation of them, and quotes the texts of VRIHASPATI, given above, as paramount and decisive authority, and then concludes by laying down, as established law, the right of the widow where there is no male issue. Thus:— "By these seven texts, VRIHASPATI having declared, that the whole wealth of the deceased man, who had no male issue, as well the immovable as the movable property, the gold and other effects shall belong to his widow, although there be brothers of the whole blood, paternal uncles, (daughters,) daughter's sons, and other heirs; and having directed that any of them who become her competitors for the succession, or who themselves seize the property, shall be punished as robbers by the king, totally denies the right of the father, the brothers, and the rest, to inherit the estate if a widow remain."—See *Dá. Bhá.*, Chap. XI, Sect. i, para. 3. Conclusion.

The doctrine of the schools other than that of Bengal is, that the widow is not entitled to succeed if her late husband was undivided, or having been separated (from his co-heirs), had become re-united. But JÍMÚTA-VÁHANA, the paramount authority of the Bengal school, after commenting on the text of VRIHAT MANU,* and refuting the arguments on which the doctrine of the other schools is founded, lays down, as established law, the result of his discussion, thus: "Therefore, the doctrine of JITENDRIYA, who affirms the right of the widow to inherit the whole property of her husband leaving no male issue, should, without attention to the circumstance of his being separated from his co-heirs or re-united with them, (for no such distinction is specified,) be respected."—*Dá. Bhá.*, Chap. XI, Sect. i, para. 46. Conclusion.

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* *Ante* page 30.

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Such is also the opinion of RAGHU-NANDANA and other compilers of law books of the Bengal school, who are in fact followers of JÍMÚTA-VÁHANA.

Explanation. (j) '*Sádhwí*,' that is, not adulterous.—SRÍ-KRISHNA'S Commentary on the *Dáya-bhága*, Sans., p. 167. Hence,—

Vyavasthá. **23.** The right of adulterous women ceases.—*Ibidem.*

Vide Precedents, pages 23, 24, 43, 50, 150, 159, 202, 203, and the Chapter on Exclusion from Inheritance.

Authority. KÁTYÁYANA:—Let the widow succeed to her husband's estate, provided she be chaste.*

Authority. KÁTYÁYANA:—The wife, who does malicious acts injurious to her husband, who has no sense of shame, who destroys his effects, or who is addicted to adultery, does not deserve property.† See Exclusion from Inheritance.

Authority. NÁRADA:—Let the brothers allow maintenance to his (the deceased's) women for life, provided these preserve unsullied the bed of their lord; but if they behave otherwise, the brethren may resume that allowance.‡ See Maintenance.

Authority. VYÁSA:—*O Arundhuti!* Gifts, fastings, religious rites, and good acts of unchaste women, are vain; their religious merits also, O spotless beauty, are fruitless.—*Verse* 734 of Chapter 137, called the *Párijáta-harana* of the book entitled the *Hari-Bansa*, in the *Mahá-bhárata*.—See *Dáya-tattwa*.

Vyavasthá. **24.** The widow, as heir to her husband, inherits only that property which belonged to him, or which he was entitled to, whether possessed of or not, or in which he had a vested interest, though the actual enjoyment was postponed during the lifetime of another; but not such property as would have devolved on him had he out-lived its owner.

Vide Precedents, pages 24—26, 41—49, 102, 151.

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* Cited in the *Mitákshará*, Chap. II, Sect. ii, § 2.

† Cited in the *Dáya-tattwa*. See *Smri. Chan.*, Chap. XI, Sect. i, Cl. 47.

‡ Cited in Mit. Inh., Chap. II, Sect. i, § 7;—*Smri. Chan.*, Chap. XI, Sect. i, Cl. 48;—and *Vyav. Mayú.*, Chap. IV, Sect. vii, § 6.

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Patní is the wife married in due legal form. Although from the etymology of the term as implying a connection with religious rites,* and according to AMARA'S definition, '*Patní* is the wife who is married in due legal form, who is (as it were) a second self (to the husband), and who is an associate in religious rites;' and also according to other authorities, it appears that she, who is *Patní*, is also *dharma-patní*, yet *dharma-patní* is generally understood to be that wife in conjunction with whom the husband performs the religious rites. The religious rites should be performed with the eldest wife living, unless she be disqualified by reason of some defect, in which case the next wife duly qualified, must be the associate in religious acts. Thus DAKSHA:—"The first wife is espoused from a sense of duty; the second excites sensual desire: union with her being productive of things of sense only, not spiritual things. The first wife is called the wife whom religious acts concern, provided she be free from defect; but if she be not, then it is no offence to employ another duly qualified."—See *Coleb.* Dig., Vol. II, page 409.

Patní defined and described.

The rank of *Patní* belongs in the first place to a woman of the highest tribe: for the text of SANKHA, &c., expresses that "the eldest wife takes the wealth," and seniority is reckoned in the order of the tribes. Thus MANU says, "When regenerate men take wives both of their own class and others, the precedence, honor and habitations of those wives must be settled according to the order of their classes." Therefore [since seniority is by class], a woman of equal class, though young in respect of the date of marriage, is deemed the eldest. The rank of *patní* belongs to her, for she alone is competent to assist in the performance of sacrifices and other sacred rites. Accordingly MANU says, "To all such married men, the wives of the same class only (not wives of a different class by any means) must perform the duty of personal attendance, and the daily business relating to acts of religion. For he, who foolishly causes those duties to be performed by any other than his wife of the same class, when she is near at hand, has been immemorially considered as a mere *chandála* begotten on a *Bráhmaní*." But on failure of a wife of the same class, one of the class immediately following [may be employed in such duties]. Thus VISHNU ordains: "If there be no wife belonging to the same class, [he may execute the business relating to acts of religion] with one of the class immediately following, in case of distress. But a regenerate man must not do so with a

Patní ascertained.

* See *Mitákshará*, Chap. II, § 5.

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woman of the *Shúdra* class." "Execute business relating to acts of religion," is understood from the preceding sentence. Therefore a *Bráhmaní* is the lawful wife (*patní*) of a *Bráhmana*. On failure of such, a *Kshatriyá* may be so, in case of distress; but not a *Voishyá*, nor a *Shúdrá*, though married to him. A *Kshatriyá* woman is wife of a *Kshatriya* man. In her default, a *Voishyá* woman may be so, as belonging to the next following tribe; but not a *Shúdrá* woman. A *Voishyá* is the only wife of a *Voishya:* since a *Shúdrá* wife is denied in respect of the regenerate tribes simply.—*Dá. Bhá.*, Ch. XI, Sect. i, § 47.

Conclusion. From the above quoted passages of the *Dáya-bhága*, it appears that formerly marriage was permitted and contracted also with a woman of a different class or tribe. It is, however, immaterial now to advert further to this, inasmuch as in the present (*Kali*) age such unions are expressly prohibited.* The term *Patní*, in the present age, can, therefore, signify no other than her who is of the same class as her husband.† So if there be many wives of the same class, they are all *patnís* (1), and religious rites are by turn performed with all of them according to the following text:—"Or without partiality he may perform the rites of religion with all his wives successively, in periods settled according to their respective precedence, or settled of his own authority to the best of his knowledge."—KÁTYÁYANA. See *Coleb.* Dig., Vol. II, pp. 407.

Remark. *Patní* as used in the singular number by the *Rishis* and authors, is applied collectively to as many as there are of the same class with their husband (1),‡ therefore,—

Annotations.

(1) The author of the *Smriti-chandriká* says:—

"The wife, '*patní*,' means a wife lawfully wedded in one of the approved forms of marriage, *Bráhma* or the like, capable of conferring on the wife a power to associate with her husband in the performance of religious sacrifices; it being also declared by *Páni-ni* that "the term '*patní*' (a wife), anomalously derived from '*pati*' (husband), is employed when connection with sacrifices (meaning religious rites) is indicated." The term '*Patní*' applies to a wife of no other kind. Hence a wife bought (as in *ásura* marriage, &c.,)

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* See the Chapter on Marriage. † *Vide W. Dá. Kra. Sang.*, Sect. ii, § 7.
‡ See *Mitákshará*, Sanskrit, page 207.

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25. If there be two or more widows (*patnis*), they inherit their husband's property simultaneously *Vyavasthá.*

Annotations.

is not called "*patni*," there not being in her *that* connection with religious rites which is essential to a '*patni*.' Accordingly in another *Smriti*: "That woman who has been purchased for value paid is not styled a '*Patni*;' she associates neither in rites relating to deities, nor in rites relating to the *manes*. The learned call her a slave (*dási*.)" When a wife is not a '*patni*,' she is capable of conferring temporal benefits only. In order to show that a wife, not being a '*patni*,' is incapable of conferring spiritual benefits, it is said that the learned call such a wife a slave or "*dási*." Hence, by the term "*patni*" being used in the text of VRIHASPATI, above quoted, before the phrase "takes his share," it is shown that, to entitle a widow to inherit the estate of her husband, it is essential that she should have been capable to perform the rites relating to the *manes* and the like."—*Smri. Chan.*, Chap. XI, Sect. i, Cls. 9—12.

The above doctrine is, however, modified or qualified by the author of the *Vira-mitrodoya*, who says :—

"The word *patni* being used, it appears that a wife married in the *ásura** or any other (disreputable) form is not entitled to inherit in the event of there existing another wife married in one of the approved forms. Thus a text of law :—"A woman who has been purchased for value paid is not styled a '*patni*:' she associates (with her husband) neither in the rites relating to deities, nor in the rites relating to the *manes*. The learned call her a slave (*dási*)." Here calling her 'a slave' is to intimate that she is incapable of associating (with her husband) in the performance of religious rites, and not that she should be treated as a slave; since by being married (to her husband), she cannot be another's wife. Therefore, by the expression "she associates neither in the rites relating to deities, nor in the rites relating to the *manes*," she is only prohibited from associating (with her husband in the performance of such rites). Thus by the (use of the) term '*patni*,' it is intimated that to entitle her to inherit (from her husband) it is essential that she should have been capable of performing the rites relating to the *manes* and the rest. Accordingly PRAJÁPATI, (by the following text), points out that the wife who is capable of associating (with her husband) in the performance of the rites prescribed in the *Veda* and *Smriti*, and who is *pati-vratá*, is alone entitled to inherit

* When matrimony is contracted by giving property or paying money to the governor or guardian of the bride, it is called *ásura* marriage.—See the Chapter on Marriage.

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as well as equally, and may, if they choose, divide it among themselves.

Vide Precedents, pages 26—29, 152. See Partition.

Remark. The author of the *Vivâda-bhangârnava* says:—"If a man die leaving two wives, equal in class, the eldest alone has a right to his estate; for on the concurrent text of DAKSHA and VISHNU, (*viz.*, 'The first wife is espoused from a sense of duty; the second excites sensual desire; union with her being productive of things of sense only, not spiritual things. If many wives of his own class be living, with the eldest alone should the husband perform religious rites,') and by the text which declares 'the eldest wife is the *patní*;' the term *patní* indicates *Dharma-patní*, the other wives are to get maintenance only." And *this* he affirms to be the opinion of JÍMÚTA-VÁHANA. But this is not correct; for JÍMÚTA-VÁHANA has only declared that, among the wives of different classes or tribes, she who is of the same tribe is the *patní*, as she is the eldest of all; but has not laid down that where there are many of the same tribe, the eldest exclusively is the *patní*. True it is VISHNU has said:—"If many wives of the same class be living, with the eldest alone should the husband conduct business relating to acts of religion;" but that cannot be taken to destroy the heritable rights of the other wives of the same class; since by performance of religious rites in conjunction with the husband, a wife becomes *Dharma-patní*, but this does by no means entitle her to inherit to the exclusion of other wives, nor by her acquiring that grade or rank, the rights of the wives who are also *patnís* are at all affected, the title of each and all of them being based on the performance after their husband's death of acts or rites beneficial to his soul; and therefore it is, that all widowed *patnís*, who perform such rites, equally inherit their husband's estate.

Annotations.

the estate (of her husband):—'Dying before her husband, a chaste *(pati-vratá)* woman partakes of his consecrated fire *(agni-hotra)*, or if her husband dies (before her), she shares his wealth.'" *Vír. Mi.*, (Sans.), p. 193.

25. If there be more than one widow, their rights are equal.—Macn. H. L., Vol. I, p. 19.

25. Where there are several widows *(patnís)*, it is proper that they should always take inheritance of their sonless husband by dividing the same in equal shares among them.—*Smri. Chan.*, Chap. XI, Sect. i, Clause 57.

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26. Upon the death of any of the several widows who inherited the estate of their husband, the whole passes to the surviving widow or widows, and not to the daughter and other heirs of the husband, so long as any of his widows be in existence. *Vyavastha.*

Vide Precedents, pages 26—29 and 152.

Because, according to the subjoined text of YÁJNAVALKYA, "The wife and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow-student: on failure of the first among these, the next in order is indeed heir to the estate of one, who departed for heaven leaving no son: this rule extends to all (persons and) classes,"—the widow being the *first* of the heirs enumerated therein, and it being ordained also that '*on failure of the first among these, the next is heir,*' none of the heirs posterior or inferior to the widow, namely, the daughters and the rest, can succeed when there is no failure of the widow, that is, while a widow is in existence; also because, according to the following text of VRIHASPATI,—"Where there are many relatives in the agnatic line, remote kindred, and cognate kindred, he of them, who is nearest of kin, shall take the property of him who dies without male issue,"—the widow of a man, who dies without male issue down to the great-grandson (in the male line), being the nearest of his relatives, is alone entitled to succeed to his estate to the exclusion of all other heirs left by him; and because it being ordained in the text of KÁTYÁYANA (to be presently cited,) that *after* a widow, her husband's heirs, (that is the nearest heirs,) succeed to the estate left by him and vacated by her; the surviving co-widow of the deceased, being the first and foremost of all the surviving heirs of the husband, must succeed also to that portion of the husband's *Reason.*

Annotations.

25, 26. If there be more than one widow, their rights are equal; the right is considered as vested only in one individual, so that the property does not go to the heirs of the husband until after the death of all the widows.—Elb. In., Sect. 163.

25, 26. It may be here observed, that if a man die leaving more than one widow, (three widows, for instance,) the property is considered as vesting in only one individual, thus, on the death of one or two of the widows, the survivor or survivors take the property, and no part vests in the other heirs of the husband until after the death of all the widows.—Macn. H. L., Vol. I, pp. 20, 21.

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estate which was inherited and left by the deceased widow of her husband.

Vyavasthá. **27. The widow inheriting the estate of her husband is only entitled to enjoy it: she is not competent to alienate such property which after her devolves on the next heir of her husband.***

Vide Precedents, pages 20—22, 29—49, 81—112, 129—137 and 153.

Authority. JÍMÚTA-VÁHANA :—But the widow must only enjoy her husband's estate after his demise. She is not entitled (*Nárhati*)† to make a gift, mortgage or sale of it.—*Dá. Bhá.*, Chap. XI, Sect. i, § 56.

Annotations.

27. So far as to the right of succession, the law is clear and indisputable; but to what she succeeds is not so apparent. She has not an absolute proprietary right, neither can she, in strictness, be called even a tenant for life; for the law provides her successors, and restricts her use of the property to very narrow limits. She cannot dispose of the smallest part, except for necessary purposes, and certain other objects particularly specified. It follows, then, that she can be considered in no other light than as a holder in trust for certain uses; so much so, that should she make waste, they who have the reversionary interest, have clearly a right to restrain her from so doing. What constitutes waste, however, must be determined by the circumstances of each individual case. (Macn. H. L., Vol. I, pp. 19, 20.) It has, however, been determined by the Dispensers of Justice that the widow is not a holder in trust, but she represents the whole estate and takes as heiress, by operation of law, a restricted estate of inheritance, her disability to alienate being general, and her ability to alienate exceptional; and that she may for a just cause leave her husband's family, and betake herself to the family of her father and the rest.—*Vide* Precedents, pp. 45, 46, 94—96, 132, 181—186.

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* *Vide. Dá. Ta.* Sans., p. 52;—*Coleb.* Dig., Vol. III, pp. 471, 472, 476;—Elb. In., pp. 73, 75.

† The author of the *Vivâda-bhangárnava* takes the expression "*Nárhati*" (is not entitled) in the sense of "ought not," and says: "it appears from the term 'ought not,' that if she do so, the act is valid: but the giver shall be amerced for bestowing that which ought not to be alienated." (See *Coleb.* Dig., Vol. III, p. 464.) Such ingenious opinion is by no means to be respected: inasmuch as it is opposed not only to the doctrine established by the paramount authorities, but even to the declaration of the said author himself, who thus gives an exposition of the widow's right and privileges: "Whence it fully appears that her disposal of it at pleasure, otherwise than by the (simple) use of it, or by donation for the benefit of her lord, is invalid."—See *Coleb.* Dig., Vol. III, p. 465.

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SRÍ-KRISHNA :—The wife is only to enjoy the estate,—she must not make a gift, mortgage or sale of it.—*Dá. Kra. Sang.*, Chap. II, Sect. i, § 3. Authority.

VRIHASPATI :—After the death of the husband, the widow preserving the family (*q*) shall obtain the share of her husband; but so long as she lives, she has not the property (therein), in making a gift, mortgage or sale. Authority.

(*q*) Preserving the family.] Preserving the honor of the line: in other words, being virtuous.—*Smri. Chan.*, Chap. XI, Sect. i, Clause 28. Explanation.

KÁTYÁYANA :—Let the childless widow (*patní*), preserving unsullied the bed of her lord (*r*), and abiding with her venerable protector (*s*), enjoy the property, with moderation [*Kshántá* (*t*)] until her death. After her let the heirs take it (*u.*)* Authority.

(*r*) "*Preserving unsullied the bed of her lord*"—that is, not co-habiting with any other man.—*Dáya-tattwa*, Sans., p. 52. Explanation.

(*r*) RAGHU-NANDANA in his *Dáya-tattwa* reads "*Vrate sthitá*" (devoted to the religious observances) in the place of "*gurou sthitá*" (abiding with her venerable protector), and the reading is expounded by the commentator KÁSHÍ-RÁMA "diligent in such observances as may be beneficial to her husband in the next world."

(*s*) "*Abiding with her venerable protector*"—that is, staying in her husband's family with her father-in-law or other members thereof, let her, so long as she lives, enjoy her husband's estate, and not, as with her independent property (*stri-dhan*), make a gift, mortgage, or sale of it, at her pleasure.—See *Dá. Bhá.*, Chap. XI, Sect. i, para. 37. Explanation.

The law, it is true, prescribes a widow's condition as only "abiding with her venerable protector," but this injunction must be adhered to in spirit rather than to the letter. It is not to be concluded that if her husband's family contains no male, or if it is impracticable or very difficult for her to stay therein, the widow cannot, even for so just a cause, and with no improper intent, leave the home of her husband's family and take up her abode with her own father and the rest,—a conclusion contrary to reason, and consequently to justice. Remark.

Hence the following exposition of JAGAN-NÁTHA appears to be correct as well as reasonable :—

* Cited also in *Smri. Chan.*, Chap. XI, Sect. i, Cl. 28; and *Vír. Mi.*, Sans, page 194.

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Explanation. (s) "*Abiding with her venerable protector*"—that is, abiding with the father of her husband and so forth, or, on failure of such (guardians) with her own father and the rest.—JAGAN-NÁTHA. See *Coleb.* Dig., Vol. III, p. 471.

So, although in conformity with KÁTYÁYANA's dictum: "abiding with her venerable protector," (*ante*, page 43) and with this of LIKHITA: "After receiving (property) she must reside with the family of her husband,"*—it is incumbent on a widow to reside with the family of her husband, yet,—

Vyavasthá. **28.** If it be very difficult for a widow to stay in the family of her husband, because of cruelty or other just cause, she may betake herself to the family of her father and the rest, provided that her change of residence be not for unchaste purposes.

See Precedents, pp. 33, 43, 50, 51. See also the Precedents of maintenance.

Authority. VRIHASPATI:—A decision must not be made solely by having recourse to the letter of written codes, since, if no decision were made according to the reason of the law (*Yukti*,)† there might be a failure of justice.‡

Vyavasthá. **29.** But, when afflicted with disease and in danger of her life, her removal to the family of her own kindred has been prescribed by law itself.

Annotations.

28. It was probably never in the contemplation of the legislator that the widow should live apart from, and out of the personal control of, her husband's relations, or possess the ability to expend more than they might deem right and proper.—Macn. H. L., Vol. I, p. 20. See, however, the Precedents above cited.

A widow is to reside in her husband's family, yet as she forfeits her right to the property only by not remaining chaste, or by making waste, the mere residing with her own family cannot cause a forfeiture of her right to the enjoyment of the property, if it is not done for unchaste purposes.—El. In., Sect. 167.

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* See *Vivádá-chintámani*, page 265.

† Or according to the immemorial usage, for the word '*Yukti*' admits both senses.—*Coleb.* Dig., Vol. II, p. 128.

‡ *Ibidem.*

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This is a law (*dharma*) of LIKHITA:—"After receiving (property) she must reside with the family of her husband; yet when afflicted by disease, and in danger of her life, she may go to her *own* kindred."*

(t) With moderation *(kshánta).*] Being abstemious: according to the commentators SRÍ-KRISHNA and ACHYUTA. Explanation.

(t) "*Kshánta,*" not prodigally expensive, but enjoying the estate with frugality; such is the exposition of the commentators. The meaning is that she many use it to support life, but not to wear delicate apparel or the like.—JAGAN-NÁTHA. See *Coleb.* Dig., Vol. 111, pp. 471, 472. Explanation.

(*u*) By the phrase "*after her let the heirs take it*" it is meant that when she dies, the daughters and others, who would regularly be heirs in default of the wife, take the estate; not the heirs of the woman's separate property; for the right of those is relative to the property of a woman (other than that which is inherited by her). Therefore, those persons, who are exhibited in the text ("The wife and daughters," &c.,) above cited† as the next heirs on failure of prior claimants, shall, in like manner, as they would have succeeded if the widow's right had never taken effect, equally succeed to the residue of the estate remaining after her use of it, upon the demise of the widow in whom the succession had vested.—See *Dá. Dhá.* Chap. X1, Sect. i, paras. 57, 58, 59; also *Coleb.* Dig., Vol. III, p. 479. Hence,— Explanation.

30. Only those nearest relations of the husband who survive his widow are entitled to inherit his property after her demise, and not those who survived him but died during the life of the widow. *Vyavasthá.*

Vide Precedents, pp. 98—112.

It must, therefore, be understood, that if any of the husband's nearest relatives, after surviving him, dies before his widow, and the rest survive her, then those who survived the widow will, at her death, inherit her husband's property vacated by her, not also the heirs of the relative who survived the husband but predeceased the widow, because they are not equal in degree to the said survivors, but their deceased ancestor was, who would have succeeded together with the said survivors, had he lived at the time of the widow's death, when the succession opened out; or, in other words, upon the widow's death, those relatives only succeed as reversionary heirs who would have been the heirs of the husband if *he* had died at *that* time. Illustration.

* Cited in the *Vivádá-chintámani*, page 265. † *Ante*, page 23.

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Vyavasthá. **31.** The fact of a woman's having recovered her husband's property by litigation gives her no unrestrained power over it.

Vide Precedents, pages 153 and 154.

Reason. Because such property also is held to be the heritage of her husband, and, as such, it can only be enjoyed by her with moderation until her death, after which the same would devolve on the reversionary heirs of her husband.

It has also been determined that—

Vyavasthá. **32.** The law, as current in Bengal, having made no distinction between the movable and immovable property inherited by a widow, she is incompetent to alienate either description of such property, by reason of spiritual benefits for the late owner being procurable by both.

Vide Precedents, pages 34, 35, 36, 39, 44, 49, 50.

Vyavasthá. **33.** As a widow is incompetent to alienate, at pleasure, the heritage of her husband, so is she incompetent to alienate, at pleasure, the surplus of the income accumulated after her enjoyment or use, or the property acquired by her with such income, or movable property.

Vide Precedents, page 129.

Reason. Inasmuch as the portion of this income remaining after her enjoyment or use is considered to form part of the corpus to which the reversioner is entitled.

Authority. In the *Mahá-bháratha,* in the chapter entitled *Dána-dharma,* it is said: "For women, the heritage of their husbands is pronounced applicable to use. Let not women,

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Annotations.

32, 34—36. With respect not only to what she may have inherited from her husband, but to its accumulated savings also, her duty is to regard herself as little more than tenant for life, and trustee for the next heirs, of property so possessed; being (as already intimated) restricted from alienating it, by her sole independent act, unless for necessary subsistence, or purposes beneficial to the deceased.—Stra. H. L., Vol. I, p. 246.

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on any account, make waste (*v*) of their husbands' property."*

Explanation.

Even use should not be by wearing delicate apparel and similar luxuries; but since a widow benefits her husband by the preservation of her person, the use of property sufficient for that purpose is authorized.* Hence,—

Vyavasthá, & Authority.

34. If she be unable to subsist (otherwise), she is authorized to mortgage the property; or, if still unable, she may also sell it without the consent of the reversioners; for the same reason is equally applicable.*—*Dá. Bhá.*, Chap. XI, Sect. i, § 61.

Vide Precedents, pages 52—54, 59, 62, 154, 155.

Vyavasthá, & Authority.

35. In like manner, (since the benefit of the husband is to be consulted), even a gift or other alienation (*x*) is permitted for the performance of the husband's funeral rites, &c. (*y*). Accordingly the author (of the *Mahá-bhárata*) says, "let not women make waste."(*h*)—*Ibidem.*

Vide Precedents, pages 37, 45, 46, 52—54, 58, 109, 154 and 155.

Explanation.

(*v*) Here "waste" intends expenditure not useful or beneficial to the (late) owner of the property.—*Dá. Bhá.*, Chap. XI, Sect. i, para. 61.

(*x*) By the term "*other alienation*" is meant mortgage or sale.

(*y*) "*For the performance of funeral rites*, &c."—That is, for conferring benefits on the husband in the next world.—SRÍ-KRISHNA'S Commentary on the *Dáya-bhága*, Sans., page 194. Hence,—

Vyavasthá.

36. She may give to the paternal uncles and other relations of her husband presents in proportion to the estate, for the benefit of his departed soul.*—*Dá. Bhá.*, Chap. XI, Sect. i, § 61.

Authority.

VRIHASPATI directs it, saying,—"With *kavya* and *púrta* (*z*), let her honor the paternal uncles (*a*) of her husband, his spiritual parents, and daughters' sons (*b*), the children of sisters (*c*), maternal uncles (*d*), and also old [(*e*) *briddha*]

* *Vide Dá. Kra. Sang.*, Chap. II, Sect. ii, § 5;—*Coleb.* Dig., Vol. III, pages 487, 678.

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and unprotected persons (*g*), guests, and females (of the family, (*f*)."*—*Ibidem.*

Explanation. (*z*) *Kavya* signifies whatever is presented to the manes, or for the benefit of the deceased; *Púrta* means food, drink, &c.—SRÍ-KRISHNA's Commentary on the *Dáya-bhága*, Sans., p. 167.

Explanation. (*z*) 'With *kavya*,' that is, with a *shráddha* after death; and 'with *púrta*,' that is, with maintenance during life,—conformably to the literal sense of the verb '*pri*,' (cherish or fill). But some lawyers expound the same phrase 'honor the paternal uncles of her husband and the rest, at the (*kavya*) rites sacred to the progenitors, and at the (*púrta*) rites sacred to the gods.' Others deduce from the expression 'honor with *kavya*, and *púrta*,' that pious offerings are alone directed; hence occasional presents of food and apparel and the like are suggested, not a settled maintenance: and this is reasonable; for, sages have not (by anticipation) composed books in conformity with the present practice.—*Coleb.* Dig., Vol. III, pp. 461, 462.

Explanation. (*a*) The term "paternal uncles" intends any of her husband's *sapindas* or kinsmen alied by a common oblation cake.—*Dá. Bhá.*, Chap. XI, Sect. i, § 63.

(*b*) "Daughters' sons" mean the descendants of her husband's daughters.—*Ibid.*

(*c*) By "the children of sisters" is meant the progeny of her husband's sister's son.—*Ibid.*

(*d*) "Maternal uncles" signify her husband's mother's family. *Ibid.*—See also *Coleb.* Dig., Vol. III, p. 462.

(*d*) "Maternal uncles"—that is, the maternal uncles of her husband.—SRÍ-KRISHNA TARKÁLANKÁRA.—See *Dá. kra. sang.*, Chap. I, Sect. ii, § 7.

(*e*) The term "*old*" implies also learned men, for both the words *briddha* and *buddha* in the Dictionary of AMARA are exhibited among the synonyma of "learned."—*Ibid.*

(*f*) "The females (of the family)"—that is the widows of her husband's son and the rest.†—*Coleb.* Dig., Vol. III, p. 460.

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* *Dá. Kra. Sang.*, Sect. ii, § 7;—*Coleb.* Dig., Vol. III, pp. 458—462. See Macn. H. L., Vol. I, p. 19;—Elb. In., p. 74, Sect. 195.

† On this same remark, the practice of this country goes farther; but however intelligent he may be, a man cannot contemplate every possible case. Some *Bráhmanas* spring from a dignified race; those who give daughters in marriage to them are exalted with their own lineage; if they do not dispose of their daughters to such persons, reverence is withdrawn: these *Bráhmanas* accept damsels in marriage from many families, but neither maintain those wives nor their offspring. Such being the notorious practice, if her (the widow's) husband have died after giving a daughter in marriage to a man sprung from a noble family, and that daughter, though virtuous, be not supported by her own husband (for, according to general practice, he is only bound to support his wife if his father-in-law, with the generosity of his ancestors, allot food and apparel to that wife, and, means permitting, give land or the like for her future maintenance;) that daughter must, if possible,

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(g) The daughters of the husband's sisters, if destitute of protectors, are included under the term "unprotected persons," otherwise they are to be supported by their lords.—*Coleb.* Dig., Vol. III, p. 460. Explanation.

All this, however, should, if possible, be done at the charge of her husband's estate; otherwise (if the funds be inadequate) it must be in words only. It is not necessary that she should deprive herself of the means of subsistence to support the uncles and other relatives of her husband; nor should she, for that purpose, do what is unauthorised by the law. But her husband's father and mother, being old, must be maintained, even though the utmost distress ensue; for MANU declared that 'a mother and father, in their old age, a virtuous wife, and an infant son, must be maintained even by the commission of a hundred offences.' By this text of MANU the widow's husband being authorised even to use irregular means for the support of his father and mother, and the rest, it is incumbent on the widow to support his parents.—*Ibid.*, p. 460. Remark.

37. To these and to the rest, let her give presents, and not to the family of her own father, while such persons are forthcoming, for the specific mention of paternal uncles and the rest would be superfluous.* *Vyavasthá.*

Vide Precedents, page 46.

Annotations.

37, 38, 45. If any thing she may take liberties with, it is in making pious and charitable gifts, with presents to her husband's relations and dependants, but not to her own, without their assent; the concurrence of her legal guardians and advisers, as well as of her husband's heirs, being generally necessary to any alienation by her of such property.—Stra. H. L., Vol. I, p. 247.

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be supported by her mother: else, how shall she subsist like an unprotected person, although she have a protector. This very practice is also proper in respect of the daughter of her father-in-law; for the dignity of her husband was raised by such act of her father-in-law (bestowing his daughter on a man of noble birth). The grand-daughter in the female line must, if possible, be likewise maintained; for she also is such as is a daughter; and persons of noble birth must give their female child in marriage to men born of noble families. This practice, founded on the rank established by the mighty prince BALLÁLA SENA, has been adopted by great personages. Though not found in codes of law, it is noticed (in this place) to explain the (subsisting) practice. It should be examined by the auspicious (learned). Hence, either these women must be comprehended under the term "females of the family," or else the usage of contracting numerous marriages must be discontinued.—*Coleb.* Dig., Vol. III, pp. 460,461.

* *Dá. Bhá.*, Ch. XI, Sect. i, § 63, 64;—*Dá. Kra. Sang.*, Sect. ii, § 7 — *Coleb.* Dig., Vol. III, pp. 458—464.

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Vyavasthá. **38. With their consent, however, she may bestow gifts on the kindred of her own father and mother.***

Vide Precedents, page 46.

Authority. In the disposal of property, that is, in gift or other alienation, she is subject to the control of her husband's kin, after his decease, and in default of sons.*

Authority. Thus NÁRADA says:—"When the husband is deceased, his kin are the guardians of the childless widow. In the disposal and preservation of property,† as well as in her maintenance, they are her *íshwara* (lords). But if the husband's family be extinct, or contain no male, or be helpless, the kin of the widow's father are her guardians, if there be no relations of her husband within the degree of *sapinda.*" (*u*)—Chap. XIII, *vs.* 28, 29.

Explanation. (*u*) Others expound the (above) precept of NÁRADA as signifying that the (nearest kinsman in the) family of her husband has authority in the disposal of property, that is, in donation. She may give a present to *that* person on whom the kinsman of her husband bids her confer one; she may bestow that which he bids her give away.—JAGAN-NÁTHA. See *Coleb.* Dig., Vol. III, p. 462.

Explanation. (*u*) The term "*íshwara*" being used in the text of NÁRADA, a woman is pronounced subject to the control of (the nearest kinsman on) her husband's side, in respect of gift, which is an alienation. Modern lawyers do not concede to this opinion; for the validity of a gift made by the owner should not be im-

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* *Dá. Bhá.*, Chap. XI, Sect. i, § 64;—*Dá. Kra. Sang.*, Sect. ii, § 7.

† There are two readings of the first part of the second hemistich of the above *vachana* or verse: 1, '*Viniyogertha-rakshásu*' (in the disposal and preservation of property), and 2, '*Viniyogátma-rakshásu*' (in the disposal of property and care of herself). Mr. Colebrooke, at p. 384, Ch. I, Book. IV, of JAGAN-NATHA'S Digest, has, in the translation of the above verse, adopted the second reading, and added in a note subjoined; "the preservation of wealth:" a various reading in Book V, Chap. VIII. But in the place referred to he says nothing about the various reading, only gives there the translation of JAGAN-NÁTHA'S comment on some words of the verse, referring for its translation to Book IV, Ch. I, and omitting (why, it does not appear), the translation of JAGAN-NÁTHA'S opinion as to the meaning of the verse, which opinion is quoted in the original. The same learned writer, in his translation of the *Dáya-bhága*, has adhered to the second reading; and Mr. Wynch, in the translation of the *Dáya-krama-sangraha*, has simply quoted Colebrooke's translation, though, singularly enough, in his edition of the (Sanskrit) text he has adopted the first reading. I adopted the first reading, not only because I find it in some parts of the *Vivádá-bhangárnava*, the original of Colebrooke's digest, and in all the editions of the *Dáya-bhága* and *Dáya-krama-sangraha*, especially in the copy of the *Dáya-bhága* edited by the late professor of Hindú law in the Government Sanscrit College, (Pandit Bharat Chandra Shiromani,) who, I know, has spared neither time nor pains to restore the text, and whose superior competency for the task cannot but be acknowledged, but also because the first reading expresses what is generally held to be the true intent of the law.

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pugned while no special text pronounces it void. As for the declared subjection of women to the control (of the nearest kinsman), when deprived of husband and son, it does not thence appear that the gift made by her is void; for the implied object (of the text) is only to show sin in not subjecting herself to the control of (the kinsman on) the husband's side.—*Ibid.*, page 464.

Jagan-nátha's opinion refuted.

Against the above opinion of JAGAN-NÁTHA'S it may suffice to say, that neither JÍMÚTA-VÁHANA and RAGHU-NANDANA nor any one of the other modern compilers and commentators, respected as superior authorities, has expressed or confirmed the doctrine alluded to by JAGAN-NÁTHA; on the contrary, all of them have pronounced opinions totally at variance with the doctrine in question. Nay JAGAN-NÁTHA himself, after quoting the text of *Vivada-chintámani*, has pronounced all such alienations to be void on the ground of *being made by one who is not owner, and not competent to make such alienations.* Thus the new doctrine broached by the said compiler is rebutted even by himself. The (modern) *pandits* have, almost unanimously, been opposed to the new doctrine; and in conformity with their *Vyavasthás*, the courts of justice have declared gifts, &c., made by widows (unauthorised by the *shástra*) to be invalid. Only a very few *pandits* have given their assent to the contrary doctrine; but they have not been in any degree followed. Two other like opinions of JAGAN-NÁTHA'S contained in his digest, Vol. III, pp. 457—466, have been refuted by the very Translator thereof, Mr. H. Colebrooke, the highest European authority on matters of Hindú law.—See Precedents, page 36.

Remark.

JAGAN-NÁTHA, moreover, basing his argument on the texts of *Mahá-bhárata* and KÁTYÁYANA, has concluded thus:—"Whence it fully appears, that her disposal of it at pleasure, otherwise than by the simple use of it, or by donation for the benefit of her lord, is invalid." (See *Coleb.* Dig., Vol. III, p. 63.) Surely, then, it is beyond the subtle ingenuity of the modern lawyers, including JAGAN-NÁTHA himself, to controvert a doctrine so conclusively laid down.

Remark.

"This also is a duty strictly incumbent on her not to appropriate the wealth of her lord to civil purposes, any more than consecrated property. Yet if she inadvertently make a gift or other alienation, it is valid (though blameable): however, the king, informed by the heirs, should duly punish her, not the acceptor of that donation; for no law authorizes his punishment. Such is the rule of decision established by modern opinions."—(*Coleb.* Dig., Vol. III, p. 566.) This, in truth, is another ingenious doctrine, and seems to have been introduced by JAGAN-NÁTHA himself under the pretended sanction of the modern authors: for it is nowhere declared by them that a gift or other alienation, inadvertently made by the widow, of her husband's property for any purpose other than to benefit her departed husband, is valid. On the contrary, the courts of justice have in-

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variably, in conformity with the opinion of the modern *pandits*, declared such alienation to be totally invalid, as will be apparent from the precedents cited.

Vyavasthá. **39.** A widow is, however, competent, even without the consent of the reversioners, to make a sale or other disposition of her husband's property for the liquidation of his debts, for the marriage of his daughter, for the support of such persons as it was incumbent upon him to support, and for such other acts as are beneficial for his soul or estate or very necessary to be performed.

Vide Precedents, pages 37, 46, 53—62, 154, 355.

Great benefit is done to a departed soul by paying his debts, by bestowing his daughter in marriage, and supporting his family: indeed, if these duties be neglected, he is doomed to hell. Thus,—

Annotations.

37, 39, 40, 48. The widow is in her right as wife *entitled* to enjoy the property of her deceased husband, and as heir, *bound* to apply it for his spiritual benefit. Generally she cannot make gifts, or sell or mortgage the property, because after her death the property is to go to the next heir of her husband, but when a sale or mortgage becomes necessary for any indispensable duty, religious or secular, or for her maintenance, it is valid, because duties must be performed, and she has a right to her maintenance from the property; and whenever gifts are made, or the property is sold or mortgaged, for the spiritual benefit of her husband, it is valid, because the heir takes the wealth for that purpose and not for his own benefit. As the spiritual benefit of the deceased and his ancestors is promoted not only by the funeral oblations made by her, but also by the rites performed by his relatives, in which he becomes a partaker, she is directed to make presents to paternal uncles and other relatives of the deceased in proportion to her wealth for the sake of his *funeral* rites. The payment of his debts is a moral as well as a legal duty; and the marriage of an unmarried daughter is a moral duty,* which, after his death, devolves on his wife; whatever is done necessarily for these purposes, is consequently valid. Elb. In., Sect. 165.

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* Not a moral duty, but one legal and indispensable. See the texts quoted in the following page.

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DEVALA :—To maidens should be given a nuptial portion out of the father's estate.* Authority.

This is proper: for, should the maiden arrive at puberty unmarried, through poverty, her father and the rest would fall to a region of punishment, as declared by holy writ. Thus :*— Authority.

VASHISHTHA says :—So many seasons of menstruation as overtake a maiden feeling the passion of love and sought in marriage by persons of suitable rank, even so many are the beings destroyed by both her father and mother; this is a maxim of the law.* Authority.

So also POITHÍNASI :—"A damsel should be given in marriage before her breasts swell. But if she have menstruated (before marriage), both the giver and the taker fall to the abyss of hell; and the father, grandfather and great-grandfather are born (insects) in ordure." Therefore, she should be given in marriage while she is yet a girl.* Authority.

NÁRADA :—Therefore a son begotten should relinquish his own property and assiduously redeem his father from debt, lest he fall into a region of torment.—*Coleb.* Dig., Vol. I, (Cal. Ed.) p. 199. Authority.

Maintenance of the family is an indispensable obligation.† Thus :— Authority.

NÁRADA says :—A man is indispensably bound to support his family.—*Coleb.* Dig., Vol. I, (Cal. Ed.) p. 301.

MANU positively declares :—"The support of persons who should be maintained is the approved means of attaining heaven. But hell is the man's portion if they suffer. Therefore, (let the master of a family) carefully maintain them."†

MANU declared, that 'a mother and a father in their old age, a virtuous wife, and an infant son, must be maintained even by the commission of a hundred offences.' By this text of MANU, the widow's husband being authorized even to use irregular means for the support of father, and the rest, these should certainly be supported by his widow.—*Vide Coleb.* Dig., Vol. III, pp. 406, 460.

RAGHU-NANDANA too acknowledges that, for the purpose of raising her husband to a region of bliss, a wife may give away property left by him, and devolving on her by the failure of male issue. Hence it is understood that she ought not to give away his property for any other purpose VÁCHASPATI BHATTÁCHÁRYYA has delivered the same exposi- Authority.

* *Dá. Bhá.*, Chap. XI, Sect. ii, § 5, 6. *Vide Coleb.* Dig., Vol. III, p. 460.
† *Dá. Bhá.*, Chap. II, § 23.

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tion. BHAVA-DEVA also concurs nearly in the same opinion.—*Coleb.* Dig., Vol. III, p. 464.

Authority. If nothing ought to be given by a wife, may she, or may she not, give money to the king by way of fine when she has committed a sin deserving pecuniary punishment? She must necessarily pay the fine by way of atonement: the prohibition relates to gifts (and payments) other than such as are positively ordained.—*Coleb.* Dig., Vol. III, p. 466.

Authority. She whose husband is deceased should support, in proportion to her ability, the same persons, and do the same acts, in the same manner in which her husband, when living, supported those persons, and did those acts. But it is not absolutely necessary that she should fulfil the same voluntary offices which her husband did, such as supporting *Bráhmanas* resident in the same town and the like. This is deduced from the term "unprotected persons." (*Ante*, p. 48.)—*Coleb.* Dig., Vol. III, p. 461.

Authority. Whatever the husband had promised to give to a person, the same, after his death, should be given by the widow to the same person, as that also is a debt (of her husband). So says*—

Authority. HÁRÍTA:—"A promise made in words, but not performed in deed, is a debt (of conscience) both in this world and the next. He, who gives not what he has promised, and he, who takes what he has given, sinks to various regions of torment, and springs again to birth from the womb of some brute animal."

Authority. Whatever (was) most desirable in the world, whatever was eagerly sought for by her husband, that should be given to some meritorious man, by the widow, anxious to gratify her husband.*—*Smriti* cited in *Dáya-tattwa*, &c.

For these and other religious but optional acts, the widow should and can alienate only a small or moderate portion of the wealth.

Remark. *The inference is the same when any other female succeeds (to the estate of the deceased).*—*Coleb.* Dig., Vol. III, p. 461.

Vide Precedents, pages 104, 164, 180—185, 202, 203.

Vyavasthá. **40.** Without the consent of her husband's reversioners a widow is, however, competent to alienate so much, and *no more*, of his property, as may be required for the performance of the indispensable duties (*nitya-karma*).† If such acts

* *Coleb.* Dig., Vol. III, p. 461.

† As in *Vyavasthá* 39 and the authorities, &c., relative thereto.

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cannot be performed without selling the whole property, the whole may be sold by her for that purpose, because such duties must be performed. But for the performance of an optional religious act (*kámya karma*), she may, without their consent, dispose of only a small portion of the estate(*a*).

Vide Precedents, pages 37, 46, 52—62, 142, 154, 155.

(*a*) An indispensable act or duty (*nitya-karma*) is that which must be performed, and cannot be neglected without sinning, as the first *shráddha* of the father or of the husband,—the marriage of his daughter, or the like. And an optional religious act is that the performance of which rests upon option, and there is no sin on the non-performance, but religious merit (*punya*), on the performance thereof,—as pilgrimage to Benares and the like. Explanation.

If the family could not be supported without selling the whole immovable or other property, even the whole may be sold, or otherwise disposed of.—*Dá. Bhá.*, Chap. II, § 26. Authority.

41. But, if the expenses for those acts including maintenance could possibly be defrayed with the accumulated wealth, or with the income of the estate, left by the deceased, then his widow cannot sell any part of his estate for the performance of any such act, much less on account of any debt contracted by her for her own purposes.* *Vyavasthá.*

Vide Precedents, pages 88—91, 112, 205—207.

42. If, however, the reversioners supply, or agree to supply, to the widow expenses for her subsistence and performance of religious acts, in that case also the widow cannot sell any portion of the estate. *Vyavasthá.*

Vide Precedents, pages 154, 155.

43. For acts other than those which are sanctioned by law, as already stated,† a widow can dispose of her husband's property *only* with the consent of the reversionary heirs of her husband, but not otherwise. *Vyavasthá.*

Vide Precedents, pages 32—49, 55, 66, 70, 71, 73, 76, 77, 155 and 158.

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* See the case of *Hafeezun-nissa' Begum* v. *Radha Benode Misser*, S. D. A. Decis., for 1856, p. 995. To be found in the Appendix.

† In *Vyavasthá* 39 and the authorities, &c., relative thereto.

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Vyavasthá. **44.** If there be no such reversionary heir, still the widow, who is not a *Bráhmaní* but of any other caste, cannot, for acts not sanctioned by law, dispose of her husband's property even without the consent of the ruling power.

Vide Precedents, page 52.

Remark. Because on failure of all heirs of a deceased proprietor who was not a *Bráhmana*, the sovereign is entitled to take his property, and because a woman is never independent but always under restriction and control.

Authority. MANU :—By a girl, or by a young woman, or by a woman advanced in years, nothing must be done, even in her own dwelling-place, according to her mere pleasure (1).—Chap. V, *verse* 147.

Authority. MANU :—In childhood, must a female be dependent on her father; in youth, on her husband; her lord being dead, on her sons; *if she have no sons, on the near kinsmen of her husband; if he left no kinsmen, on those of her father; if she have no paternal kinsmen, on the sovereign :* a woman must never seek independence.*—Chapter V, *verse* 148.

Annotations.

44. The policy of the Hindú law, with regard to the female sex, being, that they are never, at any period of their lives, or under any circumstance, to be independent. "Day and night" (says MANU), "must women be held by their protectors in a state of dependence. Their fathers protect them in childhood; their husbands protect them in youth; their sons protect them in age. A woman is never fit for independence." And a preceding text, in which the same condition is inculcated, establishes her dependence, if she have no sons, "on the near kinsmen of her husband; if he left none, on those of her father; and, having no paternal kinsmen, on the sovereign;" concluding, as already stated, that "a woman must never seek independence;" and carrying the principle to the length of declaring, that "by a girl, or by a young woman, or by a woman advanced in years, nothing must be done, even in her own dwelling-place, according to her mere pleasure." Failing relations of her husband, she is to reside with her own, enjoying their protection, and being subject to their control.—Stra. H. L., Vol. I, pp. 244–245.

* The original of the italicised words in the above text are not to be found in the Sanscrit text, but have been, by way of inuendoes, supplied by the learned translator from KULLÚKA BHATTA'S commentary, which also is a high authority, and a separate translation of which is given just below the text in question.

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In childhood, a female must be under the control of her father, in youth, of her husband, after his death, of his son; if there be no son, and no relation within the degree of his *sapindas*, the kin of her father become her guardians. If (males in) both families be extinct, then according to this text of NÁRADA: "The sovereign is the lord of women," she must be under the control of kinsmen, the sovereign and the rest: she must never be independent.—KULLÚKA BHATTA's Commentary on the above text. Authority.

MANU:—Day and night must women be held by their protectors in a state of dependence (1).—Chap. IX, *v.* 2. Authority.

Annotations.

(1) Whatever may be thought of such a state of Hindú females by the now-civilized nations, it appears to have existed amongst the most civilized and renowned nations of antiquity; as is evident from the subjoined passages:—

"A few words will suffice to assimilate the condition of the sex among the old Romans. '*Mulieres omnes,*' (says Cicero,) '*propter infirmitatem consilii, majores in tutorum potestate esse voluerunt:*'* and Livy, to the like effect, '*Nullam ne privatam quidem rem agere fœminas sine auctore voluerunt; in manu esse parentûm, fratrum, virorum.*'†

"It was the same before them with the Greek women; nor can these strictures in this respect be better closed, than by the following extract from a late elegant little work, on the states of Ancient Greece, whose institutions the Romans copied; exhibiting, with regard to the vassalage of the sex, the substance of many a text of *Manu*, and yet not a perfect picture of it, as it existed at the time to which the account refers; omitting, as it does, all allusion to that extraordinary feature, already noticed, the power of the husband to dispose of his wife by *will*, to any man whom he might choose for his successor. Speaking of the Athenian women, in an age too of refinement, 'They lived (says the learned and ingenious author) in a remote quarter of the house, and were never allowed to mingle in society with men. They were not permitted to go abroad, without being attended by a slave, who acted as a spy upon their conduct. They were given in marriage without their consent; and were expected to make the care of their families the sole object of their attention.' In a funeral oration composed by Plato, in the person of Pericles, he makes that illustrious statesman exhort the

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* Cic. Pro. Muren. II. † Liv. XXXIV, 2.

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Authority. MANU:—Their fathers protect them in childhood; their husbands protect them in youth; their sons protect them in age: a woman is never fit for independence.—Chap. IX, *verse* 3.

Explanation. The father protects a female before her marriage, after that her husband protects her, in his default her sons protect her; a woman therefore is never fit for independence. KULLÚKA BHATTA'S Commentary on the above text.

Should it be asked if a widow is competent to make a disposition, not sanctioned by law, of her husband's property, with the consent of his reversioners, is she to take the consent of *all* of them, or of *any* of them in particular?—The answer is, it has been determined that—

Vyavasthá. **45. For the validity of an alienation not sanctioned by law, the consent of *those* reversioners of the husband is necessary who are likely to be interested in disputing it; and it is *their* consent alone that renders a widow competent to make such an alienation of her husband's property.**

Vide Precedents, pages 41—48, 66—78, 86.

Remark. The mere attestation of a conveyance by a relative does not, however, necessarily import his concurrence or consent, but it is requisite that he should actually give his consent to the transaction at that time, or ratify it subsequently.—*Vide* Precedents, pp. 66, 70, 71, 78.

Vyavasthá. **46. Further, being unable to hold and manage, or for any other cause, the widow may surrender or make over the property to the *then* next reversionary heir, or, with his consent, to the heir next after him, and thus accelerate his succession.**

Vide Precedents, pages 29, 41—49, 72—81, 158.

Annotations.

Athenian women, to mind their domestic concerns; and assure them, that they would be most faithful in the discharge of their duty, when they never attracted the notice of their fellow-citizens."*— Stra. H. L., Vol. I, pp. 252, 253.

* Hill's Essays on the Institutions, &c., of the States of Ancient Greece, page 266.

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47. Likewise, upon the widow's resignation of the worldly concerns, or voluntary abandonment, the estate, inherited by her, descends at once to the then next reversionary heir, in consequence of her being divested of the property by abdication.* *Vyavasthá.*

Vide Precedents, pages 8, 9, 10, 13, 75.

48. But, if without the consent of the reversionary heirs of her husband, a widow do alienate his property without a legal necessity or for purposes not sanctioned by law but of her own, the alienation so made is illegal and invalid, and the reversionary heirs have a right to restrain her from so doing or to have the same set aside.† *Vyavasthá.*

Vide Precedents, pp. 81—91, 104—118.

It fully appears that the widow's disposal of her husband's property at pleasure otherwise than by the simple use of it, or by donation for the benefit of her lord, is invalid.—*Coleb.* Dig., Vol. III, p. 465. Authority.

49. Primarily, the immediate reversioners or those who are likely to be interested in disputing the transaction possess such right, and not those who are next after them, unless the former be incapable of doing so, or unwilling to do it through collusion with the widow, or if they have relinquished their rights in favor of the latter or authorized them to exercise the same. *Vyavasthá.*

Vide Precedents, pages 41—49, 66, 104, 112—122.

50. In the event of an alienation made by a widow of her husband's property being set aside, the property should revert to her, if she have not already committed any act involving forfeiture of her right of inheritance. *Vyavasthá.*

Vide Precedents, pages 44, 46, 84, 98, 112, 125, 136, 159.

Because, while the widow lives free from any defect causing disherison, the reversionary heirs who are posterior or inferior to her, have no right in supercession to her; also Reason.

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* See *ante*, pp. 20—22. † See *ante*, pp. 122—123.

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because, the right of such heirs accruing only at the death (natural or civil) of the widow, and there being no certainty of their surviving the widow, their right is merely a contingent one. In other words, although the reversioners may have a wrongful alienation made by a widow set aside, yet they cannot take possession of the property recovered from the purchaser, they not being *then* vested with the right to do so, and the widow not being divested of her heritable right.

Vyavasthá. **51.** If, however, it be satisfactorily proved that the widow has made waste to the injury of those who have the reversionary interest, and the property is in danger, so that, but for the interference of the court of justice, representing the sovereign, the reversioners who may eventually succeed would suffer loss from the acts of the widow, then, and not until then, the dispensers of justice, may, with the view of remedying the evil, or preventing such loss, take the management of the property from her hands, and adopt such measures whereby the estate may be secured for the ultimate heirs, provided those measures do not affect the widow's rights as the then heiress entitled to enjoy the income.

Vide Precedents, pages 129—140.

Authority. BRAHMÁ :—The king is to decide the doubtful points which cannot (otherwise) be determined ; for he is master of all.—Cited in the *Vyavahára-mayúkha* and other books.

Vyavasthá. **52.** According to the modern Judges of British India, any alienation or transfer of her husband's property made by the widow, whether for an allowable cause or otherwise, should remain intact until her death ; the reversionary heir may, however, institute a suit even during the lifetime of the widow for declaration that the conveyance was executed for causes not allowable, and is therefore not binding beyond the widow's life ; and also for remedy against the grantee to prevent waste or destruction of the property whether movable or immovable.

Vide Precedents, pages 92—97, 112—115.

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SECTION II.

On Daughters' Right of Succession.

As those persons, who are exhibited in the text "the wife, and the daughters," &c.,* to be the next heirs on failure of the prior claimants, would have succeeded if the widow's right had never taken effect, so shall they succeed to the residue of the estate remaining after her use of it, upon the demise of the widow in whom the succession had vested. At such time (when the widow dies, or when her right ceases), the succession of daughters and the rest is proper, since they confer greater benefits on the deceased (by oblations presented) than other claimants.† Therefore,—

53. In default of the widow, the daughter inherits. *Vyavasthá.*

Vide Precedents, pages 161—164, 169, 186—189.

Vishnu :—The wealth of him, who leaves no son, goes to his wife, on failure of her, it devolves on daughters; &c.—See *ante*, page 30. Authority.

Manu :—The son of a man is even as himself, and the daughter is equal to the son: how then can any other inherit (his) property, notwithstanding the survival of her, who is, as it were, himself (*a*).—Chap. IX, *v.* 130. Authority.

(*a*) Who is as it were himself.] Who is equal to the son, who is as it were himself.—*Smri. Chan.*, Chap. XI, Sect. ii, Cl. 7. Explanation.

Nárada :—On failure of male issue, the daughter inherits, for she is equally a cause of perpetuating the race: both the son and daughter prolong the father's line of descendants (*b*).—See *Dá. Bhá.*, Chap. XI, Sect. ii, § 1. Authority.

Annotations.

53, 62. In default of the widow, the daughter inherits, but neither is her interest absolute.—Macn. H. L., Vol. I, pp. 21, 22.

The right of daughters to succeed, in default of sons and widow, is not to be confounded with that of the *appointed* daughter, under the old law. The daughter under consideration takes as a principal in her own right, in default of the widow, who has precedence.—*Stra.* H. L., Vol. I, page 137.

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* *Ante*, page 29. † *Vide Dá. Bhá.*, Chap. XI, Sect. i, § 59.

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Explanation. (b) 'The line of descendants' here intends such descendants as present the oblation cake; for one who is not an offerer of oblations, confers no benefits, and consequently differs in no respect from the offspring of a stranger, or no offspring at all. The daughter's son is the giver of oblations, not his son, nor the daughter's daughter; for the oblation ceases with him.—*Dá. Bhá.*, Chap. XI, Sect. ii, § 1.

Remark. NÁRADA, conscious of the justness of the proposition, that a daughter should succeed on failure of a secondary son and widow, says, for the information of the uninstructed,—"On failure of male issue, the daughter inherits, for, she is equally a cause of perpetuating the race." The reason why the daughter is equally a cause of perpetuating the race, the same author explains by saying "since both the son and daughter are the means of prolonging the father's line."*

Remark. The meaning is, that the son and daughter both give birth to children, by whom the prosperity of their own parents is promoted. Here the equality contemplated between a son's son and a daughter's son must be understood to be an equality *in point of efficacy*, both the sons being, *in their nature*, unequal. There is no equality between them in point of clearing off the debts and inheriting the assets of the deceased, it being declared, "Debts must be paid by sons and son's sons." Referring to a grandfather's property, it has further been declared, "The ownership of the father and son is the same in it." The superiority of a son's son being, by these texts, declared in respect of assets and debts, the equality contemplated by the text of NÁRADA, above quoted, between a son's and a daughter's son, must be understood to consist in conferring benefits not temporal, that is, in the performance of *shráddhas;* it being declared by VISHNU :—"In offering oblations to the *manes*, the daughter's sons are considered as son's sons." The daughters, therefore, stand conspicuous in the line of succession by reason of their conferring benefits by means of their descendants.*

Conclusion. It cannot, however, be hence said, that where there is no male issue, a daughter inherits in preference to a widow (*patní*); the latter being in her own person competent to associate in the performance of religious sacrifices (*agni-hotra*), &c., which are acts capable of conferring spiritual benefits on the deceased. Therefore, the term "male issue" used in the passage "on failure of male issue, the daughter inherits," must be considered by synecdoche to include a *patní* (widow) also.†

Authority. VRIHASPATI :—The wife is pronounced successor to the wealth of her husband; in her default, the daughter. As a son, so does the daughter of a man proceed from his

* *Vide Smri. Chan.*, Chap. XI, Sect. ii, Cls. 8, 9, 10, 11.

† *Smri. Chan.*, Chap. XI, Sect. ii, Cl. 11.

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several limbs. How then, should any other person (*c*) take her father's wealth.—*Vide Mit.* In., Chap. II, Sect. ii, § 2.

(*c*) Any other person.] These terms exclude the son and widow, (who are preferable heirs,) and include the father and the rest.—*Smri. Chan.*, Chap. XI, Sect. ii, Cls. 5 & 6. Explanation.

The meaning is, how could the father and the rest take the property of a sonless man, while the daughter is alive.—*Ibid.* Explanation.

In springing from the limbs of the father, a daughter is equal to a son. The difference, however, is this. In the procreation of a son, the contribution of the father's part is greater; whereas, in that of a daughter, it is less, it being declared "A male child is procreated, if the seed predominate, but a female child is procreated if the woman contribute most to the fœtus." MANU. Hence a daughter is pronounced equal to a son to a certain extent.—*Ibid.*, Cl. 4. Explanation.

54. Of the daughters married and unmarried, the unmarried is, in the first place, sole heiress of her father's property.* *Vyavasthá.*

Vide Precedents, pages 163, 164, 187.

Here again the unmarried daughter is in the first place the sole heiress (*d*) of her father's property.—*Dá. Bhá.*, Chap. XI, Sect. iii, § 4. Authority.

(*d*). "*The unmarried daughter is the sole heiress*"—that is, to the exclusion of the married daughter or daughters, if any.—SRÍ-KRISHNA'S Commentary on the *Dáya-bhága.* Accordingly,— Explanation.

PARÁSARA says:—Let a maiden daughter take the heritage of one who dies leaving no son (grandson, and great-grandson); if there be no such daughter, the married (*e*) daughter shall inherit.† Authority.

(*e*) By the term "*married*" is here meant the daughter who has a son, or who is capable of bearing a son; and not the daughter who is barren, or who is a sonless widow. See *Dá. Bhá.*, Chap. XI, Sect. ii, § 1—3. Explanation

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Annotations.

54. According to the doctrine of the Bengal school, the unmarried daughter is first entitled to the succession.—Macn. H. L., Vol. I, page 21.

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* *Dá. Kra. Sang.*, Sect. iii, § 2;—*Dá. Ta.*, Sans., p. 54;—*Coleb.* Dig., Vol. III, p. 490.

† Cited in *Dá. Bhá.*, Chap. XI, Sect. ii, § 4;—*Dá. Kra. Sang.*, Sect. iii, § 2; *Coleb.* Dig., Vol. III, p. 490;—*Dá. Ta.*, Sans., p. 54.

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Authority. DEVALA:—Of him, who leaves no appointed daughter, (nor son,) the *dharma-já* (*f*) maiden daughter, of his own tribe (*g*), shall, like a son, take the inheritance.*

Explanation. (*f*) *Dharma-já.*] Daughter of the body and born of a legally married wife of the same tribe with himself.—See *Ourasa. Ante,* page 14.

Explanation. (*g*) "*Of his own tribe*"—that is, born of a wife of the same tribe with himself.

Authority. RISHYA-SRINGA:—The maiden daughter of a person who dies leaving no male issue, offers the funeral cake to his *manes.*—See *Shuddhi-tattwa.*

Remark. If the maiden daughter, in whom the succession has vested, and who has been afterwards married, die, the estate which was hers, becomes the property of those persons, the married daughter or others, who would regularly succeed if there were no such (unmarried daughter) in whom the inheritance vested, and in like manner succeed on her demise after it has so vested in her. It does not become the property of her husband and other heirs: for that text, (which is declaratory of the right of the husband and the rest) is relative exclusively to a woman's separate property (*stri-dhan*).—*Dá. Bhá.*, Chap. XI, Sect. ii, § 30.

Remark. The maiden daughter, in whom the succession has vested, and who has been afterwards married, may die leaving, or without leaving, a son; in the second case, the succession of the sister who has, or is capable of having, a son, is indisputable. In the first case, however, SRÍ-KRISHNA TARKÁLANKÁRA is of opinion that if the maiden daughter (vested with the succession, and afterwards married) die leaving a son, that son alone should succeed. But JÍMÚTA-VÁHANA and the rest seem to be of opinion that, whether the maiden daughter vested with the succession, and afterwards married, die leaving or without leaving a son, in either case her sister who has, or is likely to have, a son, is entitled to succeed; for had it been the case that, on the death of the said daughter, her surviving son was alone entitled to inherit, these authors would certainly have laid it down as a particular rule. In truth, the opinion of SRÍ-KRISHNA is not consistent with justice and reason, as in that case, during the existence of the daughter who has, or is capable of having, a son, the daughter's son, whose title is posterior to that of the daughter, shall succeed *before* her, without a

* Cited in *Dá. Bhá.*, Chap. XI, Sect. ii, § 5;—*Di. Kra. Sang.*, Sect. iii, para. 1;—*Coleb.* Dig., Vol. III, pp. 490 and 491.

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positive text declaratory of his title; and the other daughter's sons, who equally confer benefits on their grandfather by presenting the oblation of food and libation of water, shall, without a just cause, be excluded.* The opinion of JÍMÚTA-VÁHANA, the founder, as well as the highest authority, of the Bengal school, should, therefore, prevail in practice; for YÁJNAVALKYA declares: "If two texts differ, reason (or that which it best supports) must in practice prevail."†

Remark.

SRÍ-KRISHNA TARKÁLANKÁRA by laying down in his commentary on the *Dáya-bhága*, that 'if there be no widow, the daughter inherits; in the first place, a maiden daughter; or on failure of such, an affianced daughter, but if there be none, a married daughter,' has made a distinction in respect of succession between the daughter who is, and the daughter who is not, betrothed. Although this doctrine is not laid down by any other authority, yet it does not appear to be inconsistent with reason,—for when under authority of a text of GOUTAMA, such distinction is made in the succession to the *Strí-dhan*, then according to the maxim—"The sense of the law, ascertained in one instance, is applicable in others also, provided there be no impediment,"‡ it cannot be regarded as untenable.§ Consequently,—

Vyavasthá.

55. If there be no maiden daughter, then the daughter who has, and the daughter who is likely to have, a son, equally succeed.‖

Vide Precedents, pages 161—163, 169, 190—192.

Annotations.

55, 59, 60. If there be no maiden daughter, the daughter who has, and the daughter who is likely to have, male issue, are together entitled to the succession, and on failure of either of them, the other takes the heritage.—Macn. H. L., Vol. I, p. 21.

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* Sir William Macnaghten, Mr. Elberling, and a few Judges of the High Court, have followed the above opinion of SRÍ-KRISHNA TARKÁLANKÁRA, perhaps without consulting JÍMÚTA-VÁHANA and the rest.—See the precedent and the remarks thereon at pp. 165—167.

† *Vide Coleb.* Dig., Vol. III, p. 505.

‡ *Dá. Bhá.*, Chap. III, Sect. ii, § 31 Annotation;—*Coleb.* Dig., Vol. II, p. 18. See Precedents, pp. 200—203.

§ Although Sir William Macnaghten in his Hindú Law, (Vol. I, p. 21) disapproves of the above distinction by saying, "this doctrine is not concurred in by any other authority," yet since, in the 2nd volume of the same work (p. 40), he has quoted, among the approved legal opinions, a *Vyavasthá* delivered by the Court *Pandits* in conformity with the above distinction, without making any remark as to the impropriety thereof, he must be considered to have afterwards acquiesced in it. See Precedents, p. 188.

‖ *Dá. Bhá.*, Chap. XI, Sect. ii, § 8;—*Dá. Kra. Sang.*, Sect. ii, § 4;—*Coleb.* Dig., Vol. III, pp. 490, 492;—*Dá. Tu.*, Sans., p. 54.

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Authority. This is in conformity with the foregoing text of PARÁSHARA* and the following text of VRIHASPATI :—" Being of equal class (*h*) and married to a man of like tribe (*i*), and being virtuous (*j*) and devoted to obedience, she (namely the daughter) whether *kritá* or *a-kritá* (*k*), shall take the property of her father who leaves no son."(*l*) See *Dá. Bhá.*, Chap. XI, Sect. ii, § 8.

(*h*) "*Of equal class*"—that is, belonging to the same tribe with her father.—*Ibid.*, § 9.

(*i*) *Married to a man of like tribe.*]—This is intended to exclude one married to a man of a superior or inferior tribe. For the offspring of a daughter married to a man of a higher or lower class is forbidden to perform the obsequies of his maternal grandfather and other ancestors who are of inferior or superior rank. But one, married to a man belonging to the same class, confers benefits on her father by means of her son.—*Ibid.*

Vyavasthá. **56. (*j*) *Being virtuous.*]—By the use of this term† an unchaste daughter is excluded from the inheritance.**

Vide Precedents, pages 192, 193, 200—203.

Reason. It having been laid down that an unchaste widow does not inherit,‡ *a fortiori*, a daughter who is inferior to, and whose heritable right is weaker than that of, the widow, cannot inherit, if unchaste.—*Vide* Precedents, pages 104, 181—185, 202, 203.

Authority. The word "wife" (in the text above quoted§) is employed with a general import: and it implies, that the rule must be understood as applicable generally to the case of a woman's succession by inheritance.—*Dá. Bhá.*, Chap. XI, Sect. ii, § 31.

Explanation. (*k*) '*Kritá*'—that is, appointed to continue the male issue. '*A-kritá*'—not so. The term *Puttriká-puttra* signifies either a son of the appointed daughter, as is said by VASHISHTHA: "This damsel, who has no brother, I will give unto thee, decked with ornaments: the son, who may be born of her, shall be my son;" or that term may signify a daughter becoming by special appointment a son; accordingly she is mentioned also by VASHISHTHA "a son second in rank: that is, the appointed daughter is considered to be a son second in rank."—*Mitákshará.* According to JÍMÚTAVÁHANA—The appointed daughter is as it were a son (*puttra*): and her son is deemed a son's son (*pouttra*); and her father, to whom he (thus) appertains, becomes grandsire of son's son.—See *Dá. Bhá.*, Chap. X, § 3.

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* Cited at page 63. † Used in the above text of VRIHASPATI.

‡ *Ante* page 36. § That is in the text of KÁTYÁYANA cited at page 43.

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(l) The expression "no son" (here) implies the failure of son, grandson, great-grandson, and wife; since the daughter's right accrues on failure of these.—SRÍ-KRISHNA's Commentary on the *Dáya-bhága.* Explanation.

57. The daughter who is barren or who is a sonless widow is not competent to inherit, notwithstanding the failure of the daughter who has, and the daughter who is capable of having, a son.* Vyavasthá.

Vide Precedents, pages 161—165, 181, 190, 191.

"Because they cannot confer benefit (on their deceased father) by presentation of the *párvana* oblation through their sons." This opinion of DIKSHITA has been respected even by the author of *Dáya-bhága.*—See *Dá. Kra. Sang.*, Sect. iii, para. 5. Reason.

JÍMÚTA-VÁHANA:—The doctrine should be respected, which DIKSHITA maintains; namely, that a daughter, who is mother of male issue, or who is likely to become so, is competent to inherit; not one, who is a widow, or is barren, or fails in bringing male issue as bearing none but daughters, or from some other cause.—*Dá. Bhá.*, Chap. XI, Sect. ii, para. 3. So,— Authority.

58. Neither the daughter whose son is dead, but who has a son's son, nor she who has a female issue, inherit, though they were not barren.*—*Coleb.* Dig., Vol. III, p. 491. Vyavasthá.

Vide Precedents, pages 161—165.

The above is founded or derived by JAGAN-NÁTHA on or from the text of NÁRADA and its interpretation by JÍMÚTA-VÁHANA already quoted (at pp. 61, 62). See *Coleb.* Dig., Vol. III, p. 491.

59. If there be several daughters capable of inheriting, they collectively take their father's heritage, or divide it among themselves. Vyavasthá.

Vide Precedents, pages 162, 168, 169—186.

Annotations.

57, 58. Under no circumstances the daughters, who are barren, or widows destitute of male issue, or the mothers of daughter only, inherit the property.—Macn. H. L., Vol. I, p. 21.

59. But if there be more than one, they will divide it, and take shares.—*Vyav. Mayú.*, Chap. II, Sect. viii, § 9.

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* *Dá. Kra. Sang.*, Sect. iii, § 5;—*Dá. Bhá.*, Sect. ii, § 3;—Elb. In., page 76.

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Authority. If the daughters competent to succeed be numerous, a distribution should be made among them.—*Coleb.* Dig., Vol. III, p. 498.

60. Upon the death, natural or civil, of any of the daughters in whom succession had vested, the surviving daughter or daughters take the portion of the patrimony inherited and vacated by the deceased, not the daughter's son and the rest.*

Vide Precedents, pages 168, 169—186, 192, 193.

Reason. Because daughters' sons being posterior or inferior to daughters, their succession has been ordained in default of daughters.

Further, upon the death, natural or civil, of any of the daughters who inherited their patrimony, the surviving daughters are alone entitled to the portion of the patrimony inherited and vacated by their deceased sister, and not the son of the deceased daughter, because a daughter being nearer than a daughter's son, the latter cannot inherit so

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Annotations.

60. On the decease of one of them, whether they have male issue or not, the estate devolves on the surviving daughter; and it is not till after the death of all these daughters that the estate goes to the next heir of the father.—Elb. In., page 76.

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* In the case where two daughters succeeded to their father's estate, and one of them died leaving her sister then a childless widow, and a son, a question may arise whether the property inherited by the deceased woman would be taken by her son, or would devolve upon the sister though then disqualified to inherit. There are opinions both ways; some lawyers are of opinion that the surviving sister being a childless widow, and (therefore) incompetent to inherit, the property should devolve on the son of the deceased. But others maintain that the surviving sister's being disqualified to inherit at the time of her sister's death is no bar to her taking her father's property left by the sister, because she does not inherit her sister's property so that her disqualification at the time of *her* death should be taken into consideration; (and the fact of its being her father's, and not her sister's, property is manifest from her not having had absolute proprietary right over it, but only a restricted interest therein, as well as from its devolving on her father's heirs and not on her own heirs;) and because, like wives, the two daughters were, in the legal sense, held to be one and the same heir collectively succeeding to, and holding, their father's property, which on the death of one would of course remain in the hands of the other. This (latter) opinion is maintained by the High Court in its Original Jurisdiction. See case No. 66 of 1865—*Boidya-Náth Sett*, plaintiff, v. *Durgá-charan Basák*, decided on the 28th of February 1865, by the Hon'ble W. Morgan who consulted the Hon'ble Shambhu-nath Pandit on the point in question. The latter opinion has also been adopted by the Privy Council.—*Vide* Precedents, pages 168—180.

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long as there exists a single daughter competent to inherit. Should it be asked, how it is that a son's son whose father is dead inherits his grandfather's estate simultaneously with his paternal uncle? The answer is: He does so under special texts to that effect, and there is no text ordaining that a daughter's son whose mother is dead should inherit his maternal grandfather's property simultaneously with his mother's sister.

61. The right once vested in a daughter does not cease until her death, natural or civil,* notwithstanding she become barren or a sonless widow who bore daughters only. *Vyavasthá.*

Vide Precedents, pp. 168, 169—180.

Because being barren or a sonless widow is not, like civil death, a cause of destroying heritable right already accrued and vested.* Reason.

62. The daughter, too, without a legal necessity or any of the acts, religious or secular, mentioned in the widow's succession,† is incompetent to make a gift, mortgage, or sale of the property inherited by her, but is to enjoy it with moderation until her death. After that, her father's (next) heirs will take it. *Vyavasthá.*

Vide Precedents, page 36, 179, 182—186.

As a daughter is inferior to a widow, or her right is weaker than that of a widow, it necessarily follows that she, Reason.

Annotations.

62. In default of the widow, the daughter inherits, but neither is her interest *absolute*.—Macn. H. L., Vol. I, p. 21.

62. As the daughter's right to succeed is inferior to that of the widow, it necessarily follows that she too is only to enjoy the property, and that she is subject to the same restrictions in the use of it as the widow. On her death, the estate goes to her father's next heir.—Elb. In., Sect. 171.

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* See *ante* pp. 8—10, and the Chapter on Exclusion from Inheritance.

† *Ante* pages 52—54.

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in the disposal of her father's heritage, is subject to the same restrictions and liberties as a widow is in the disposal of her husband's heritage.

In other words, the next heir of the former owner being entitled to inherit the property inherited and vacated by a widow, it has been determined that the word widow (*patní*) is employed with a general import; and the rule on the above point laid down in the widow's succession, must be understood as applicable generally to the case of a woman's succession to inheritance.—*Vide* Precedents, pages 104, 181, 182, 183, 184, 185, 202, 203, 209.

Authority. Since it is shown by the text "let her enjoy with moderation the property of her lord: after her let the heirs take it,"* that on the decease of the widow in whom the succession had vested, the legal heirs of the former owner who would inherit his property if there were no widow in whom the succession had vested, namely, the daughters and the rest, succeed to the wealth; therefore, the same rule (concerning the succession of the former possessor's next heirs†) is inferred, *a fortiori*, in the case of the daughter and grandson (daughter's son) whose pretensions are inferior to the wife's. Or the word "wife" (in the text above quoted‡) is employed with a general import; and it implies, that the rule must be understood as applicable generally to the case of a woman's succession by inheritance.—JÍMÚTA-VÁHANA. *Dá. Bhá.*, Ch. XI, Sect. iii, § 30, 31. *Vide* Precedents, pages 36, 104, 203, 204.

"JÍMÚTA-VÁHANA only says that wealth which has devolved on a daughter goes after her (death) to the heir of her father; he has not expressly affirmed, that a daughter shall not alien an estate which has devolved to her: but if it be said, the general maxim, '*that after a woman, the legal heirs* (of the former male proprietor), *take the estate*,' cannot be deduced without establishing a general rule *that a woman shall merely* enjoy an estate which has devolved on her; it then follows that such is his meaning, but not otherwise."—JAGAN-NÁTHA. (See *Coleb.* Dig., Vol. III, p. 497.) The passage immediately preceding shows, however, that this remark of JAGAN-NÁTHA'S, as far as it respects JÍMÚTA-VÁHANA, is not accurate.

Authority. In the phrase "The widow (*patní*) will enjoy the property with moderation, until her death"§—the word '*patní*' is

* See *ante* page 43. † SRÍ-KRISHNA.

‡ That is in the text of KÁTYÁYANA quoted at page 43.

§ Contained in the text of KÁTYÁYANA cited at page 43.

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put as an example, it embraces all of those females who are entitled to inherit.—SRÍ-KRISHNA'S Commentary on the *Dáya-bhága*, Sanskrit, page 205.

The modes of succession of females (entitled to inherit) being alike, it is to be held that the heir of the former (male) owner succeeds to the property of an inheritrix; consequently, the word '*patní*' intends any female entitled to inherit.—*Ibid.* Authority.

SECTION III.

ON DAUGHTER'S SON'S RIGHT OF SUCCESSION.

63. On failure of the qualified daughter(*a*), the succession devolves on the daughter's son.* *Vyavasthá.*

Vide Precedents, pages 193—198.

(*a*) By the expression "on failure of the qualified daughter" is here meant the failure of the maiden daughter, the daughter who has, and the daughter who is likely to have, a son; since the daughter's son inherits notwithstanding the existence of the daughter who is barren or a sonless widow. Explanation.

VRIHASPATI:—As the ownership of the father's wealth devolves on her (the daughter), although kindred exist, so her son likewise becomes the owner of his mother's (and) maternal grandfather's estate.—Cited in *Vír. Mi.*, (Sans.), p. 205; and *Vi. Chi.*, (Sans.), p. 153. See P. C. Tagore's Translation, page 294. Authority.

As by means of the oblation-cake offered by her son, a daughter inherits her father's estate, so by the presentation of the same oblation-cake, her son also becomes the owner of his maternal grandfather's estate, although kindred, that is, the father and the rest, exist. Such is the meaning.—*Vír. Mi.*, (Sans.), p. 205. Explanation.

Annotations.

63. According to the law of Bengal and Benares, the daughter's sons inherit in default of the qualified daughters; but the right of daughter's sons is not recognized by the *Mithilá* school.—Macn. H. L., Vol. I, p. 23.

* *Dá. Kra. Sang.*, Chap. I, Sect. iv, § 1;—*Dá. Bhá.*, Ch. XI, Sect. ii, paras. 17 & 19;—*Coleb.* Dig., Vol. III, p. 498;—Elb. In., p. 77.

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Authority. MANU :—By that male child, whom a daughter, whether formally appointed or not, shall produce from a husband of equal class, the maternal grandfather becomes grandsire of a son's son (*b*): let that son offer the oblation-cake and possess the inheritance.—Chap. IX, *v.* 136.

Explanation. (*b*) "The grandsire of a son's son"—by this it is intimated that as in default of a son, the son's son takes the heritage of his paternal grandfather, so in default of a daughter, the daughter's son (inherits the property of his maternal grandfather).—*Vír. Mi.*, (Sans.), p. 205.

Authority. MANU :—Let the daughter's son take the whole estate of the father (*c*) who leaves no son (*d*); and let him offer two funeral oblations;—one to his own father, the other to his maternal grandfather.—Chap. IX, *v.* 132.

Explanation. (*c*) "Of the father"—that is, of the father of the mother.—*Dá. Kra. Sang.*, Sect. iv, § 1.

Explanation. (*d*) The term "leaving no son" is here used to signify failure of heirs as far as the daughter, otherwise it contradicts the text of YÁJNAVALKYA, ("The wife, and the daughters," &c. *Ante* page 29,) and also the texts of other sages.—See *Dá. Kra. Sang.*, Sect. iv, § 1.

Authority. MANU :—Between a son's son and the son of a daughter there is no difference in law; since their father and mother both sprung from the body of the same man.—Chapter IX, *verse* 133.

VISHNU :—If one die leaving neither son nor grandson, the daughter's son shall inherit the estate; (for, by consent of all,) the son's son and the daughter's son are alike (1) in respect of the celebration of obsequies.*

Annotations.

(1) Here the equality contemplated between a son's son and a daughter's son must be understood to be an equality *in point of efficacy*, both the sons being, *in their nature*, unequal. There is no equality between them in point of clearing off the debts and

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* *Dá. Bhá.*, Chap. XI, Sect. ii, § 23 ;—*Coleb.* Dig., Vol. III, p. 498. This text is not found in the institutes of VISHNU. It is cited in the *Dáya-bhága* and *Dáya-tattwa* on the authoritity of *Govinda-rája's* quotation.

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The maiden daughter, married daughter, and daughter's son, are all signified by the plural term "daughters" in YÁJNAVALKYA'S text:—"The wife and the daughters," &c. (*Ante*, p. 29.) As the word "son," in the phrase "who departed for heaven leaving no son," intends male issue down to the great-grandson, since he is equally a giver of oblations, so does the term "daughters" comprehend the daughter's son, for he also is the giver of oblation-cakes.—*Dá. Bhá.*, Chap. XI, Sect. ii, § 27. **Authority.**

Therefore the succession of the daughter's son, on failure of daughters, as affirmed by VISHWA-RÚPA, JITENDRIYA, BHOJADEVA, and GOVINDA-RÁJA, should be respected.—*Ibid.*, § 29. **Conclusion.**

64. If there be sons of more than one daughter, they take *per capita*, and not *per stirpes*. ***Vyavasthá.***

Vide Precedents, pages 193, 194.

Annotations.

inheriting the assets of the deceased; it being declared—"Debts must be paid by sons and sons' sons." Referring to a grandfather's property, it has further been declared—"The ownership of the father and son is the same in it." The superiority of a son's son being, by these texts, declared in respect of assets and debts, the equality contemplated by the text of NÁRADA, above quoted, between a son's son and a daughter's son, must be understood to consist in conferring benefits not temporal, that is, in the performance of *Shráddhas;* it being declared by VISHNU—"In offering oblations to the *manes*, the daughter's sons are considered as son's sons." The daughters, therefore, stand conspicuous in the line of succession by reason of their conferring benefits by means of their descendants.—*Smri. Chan.*, Chap. XI, Sect. ii, Cl. 10.

Although (in the text of *Vrihat* VISHNU,) the father is said to inherit the property of a sonless man, in default of the daughter, yet, as reasons have already been shewn why the daughter's son should inherit in default of the daughter, it must be understood that the succession of a father does not come until the failure of daughter's sons. It must further be noticed that a daughter's son being connected with the line of the daughter herself, a separate mention of him in the order of heirs was considered unnecessary by *Vrihat* VISHNU.—*Smri. Chan.*, Chap. X, Sect. iii, Clause 10.

64. If there be sons of more than one daughter, they take *per capita*, and not, as sons' sons do, *per stirpes*.—Macn. H. L., Vol. I, page 23.

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Authority. If the daughters' sons be numerous, a distribution must be made: the shares shall be equal and inherited *per capita*, and not *per stirpes*.—*Coleb.* Dig., Vol. II, p. 502.

Illustration. For instance,—if there be two sons of one daughter, and three of another, five equal shares must be allotted: they shall not first divide the estate into two parts, and afterwards allot one share to each; for such a mode of distribution is *only* ordained in partition among the sons of sons: and the reasoning is not equal, for, a son's son, whose own father is dead, receives a share from his uncle; but the daughter's son, whose mother is deceased, does not receive a share from his mother's sister.—*Coleb.* Dig., Vol. III, page 501.

Vyavasthá. **65.** On the death of a daughter's son, who has received the heritage of his maternal grandfather, his own son or other heir takes the estate inherited by him, because it had become the property of his ancestor; and not the heirs of the maternal grandfather.—*Coleb.* Dig., Vol. III, p. 502.

Vide Precedents, pages 193, 194.

SECTION IV.

ON THE SUCCESSION OF PARENTS AND THEIR ISSUE.

ON THE FATHER'S RIGHT OF SUCCESSION.

Vyavasthá. **66.** On failure of the daughter's son *(a)*, the succession devolves on the father.*

Vide Precedents, pages 193, 194, 199.

Reason. Because, he confers benefit (on the deceased son) by presentation of two oblation-cakes, (one to the grandfather, and the other to the great-grandfather of that son,) in which the deceased participates.—*Dá. Kra. Sang.*, Chap. I, Sect. v, § 1.

Annotations.

66. In default of daughters' sons, the father inherits according to the law as current in Bengal.—Macn. H. L., Vol. I, p. 25.

* *Dá. Bhá.*, Ch. XI, Sect. 3, para. 1, p. 194;—*Dá. Kra. Sang.*, pp. 11, 22;—*Coleb.* Dig., Vol. III, p. 504;—*Dá. T.*, Sans., p. 54:—Elb. In., p. 77.

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The texts of VISHNU and YÁJNAVALKYA, cited at pages 29 and 30. Authority.

After partition, if a son die leaving no son (*b*), the father takes the (deceased son's) property.*—KÁTYÁYANA. Authority.

(*a*) Here the expression "failure of daughter's son" means the circumstance of a daughter's son not being born, as well as the failure of such daughter's son as was not vested with the succession, since on failure of a daughter's son vested with succession, his own heir shall succeed to the estate (and not the heir of the former owner). Explanation.

(*b*) Here the term "leaving no son" comprehends the failure of heirs as far as the daughter's son.

If there be no daughter's son, the succession devolves on the father, and not on the mother (before the father); nor at once on both parents. For that is contrary to VISHNU'S text—"If there be none, it belongs to the father; if he be dead, it appertains to the mother." (*Ante*, p. 30.)—*Dá. Bhá.*, Chap. XI, Sect. iii, § 1. Authority.

JÍMÚTA-VÁHANA:—This is a result too of reasoning:—That the father's right of succession should be after the daughter's son, and before the mother, because the father is preferable to the mother and the rest, because he presents (personally) to others two oblation-cakes in which the deceased participates; and his superiority is indicated in a passage of MANU: "In a comparison of the male with the female sex, the male is pronounced superior" (9. 35); and in the term "*pitarou*, both parents," the priority of the father is indicated: for the father is first suggested by the radical term '*pitri*;' and afterwards the mother is inferred from the dual number, by assuming, that one term (of two which composed the phrase) is retained; and because the prior succession of the mother would contradict the text of VISHNU: "If there be none, it belongs to the father; if he be dead, it appertains to the mother."—*Dá. Bhá*, Chap. XI, Sect. iii, § 3. Authority.

The reading approved of by JÍMÚTA-VÁHANA must be followed in the text of VISHNU, (*ante* p. 30); for YÁJNAVALKYA declares: "if two texts differ, reason (or that which it best supports) must in practice prevail, when the reason of law can be shown."—*Vide Coleb.* Dig., Vol. III, p. 505. Remark.

VÁCHASPATI MISRA, (and others) by adopting a different reading in the text of VISHNU,—"The wealth of him who leaves no male issue, goes to his wife: on failure of her, it devolves on daughters: if there be none, it belongs to the mother, if she be dead, it appertains to the father,"—have declared the mother's right of succession to precede that of the father. This

* This text is inaccurately translated in Winch's *Dáya-krama-sangraha*, Chap. I, Sect. v, § 1, and Colebrooke's Digest, Vol. III, p. 506.

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is not correct; for the reading established by the original text of VISHNU, is the reverse (of that which they have adopted,) namely: "If there be none, it belongs to the father; if he be dead, it appertains to the mother." It has also been thus transcribed by all authors. Besides, the other reading is at variance with the text of KÁTYÁYANA above cited.—*Dá. Kra. Sang.*, Sect. v, § 1, 2.

ON THE MOTHER'S RIGHT OF SUCCESSION.

Vyavasthá. **67.** In default of the father, the succession devolves on the mother.*

Vide Precedents, pages 199, 205—208, 213, 214, 233, 253.

Reason. For, the mother confers benefits on the deceased owner by the birth of his brother, who offers three funeral oblations to the father, grandfather and great-grandfather of the deceased owner in which he participates.—*Dá. Kra. Sang.*, Chap. I, Sect. vi, § 2.

Reason. Since it is necessary to make a grateful return to her, for the benefits which she has personally conferred by bearing the child in her womb, and nurturing him during his infancy; and also because she confers benefits on him by the birth of other sons who offer three oblation-cakes, in which he will participate.—*Dá. Bhá.*, Chap. XI, Sect. iv, § 2.

Authority. If the father be not living, the succession devolves on the mother: for, immediately after propounding the father's right to the estate, VISHNU's text† declares: "If he be dead, it appertains to the mother."—*Dá. Bhá.*, Chap. XI, Sect. iv, § 1.

VYÁSA:—"Ten months the mother bore her infant in her womb, suffering extreme anguish, fainting with travail and various pangs, she brought forth her child. Loving her son more than her life, the tender mother is (justly) revered: who could repay her, even though he tried a hundred years!"

Annotations.

67, 70. In default of the father, the mother inherits. Her interest, however, is not absolute, but is of a nature similar to that of the widow.—Macn. H. L., Vol. I, p. 25.

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* *Dá. Bhá.*, Ch. XI, Sect. 4, para. 1, 2; See *Dá. Kra. Sang.*, Chap. I, Sect. vi, § 1; *Dá. Ta.*, Chap. XI, § 28; *Coleb.* Dig., Vol. III, p. 505; Elb. In., p. 76.

† *Ante* page 30.

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MANU :—"A mother surpasses a thousand fathers, for she bears the child in her womb, and nourishes it; therefore is a mother most venerable. A (mere) *Áchárryya* surpasses ten *Upádhyáyas*: a father, a hundred such *Áchárryyas*; and a mother, a thousand (natural) fathers." Nevertheless,—

The notion that the mother's right should precede the father's, because she is pronounced to surpass the father in the degree of veneration due to her, must be rejected. For, if a superior title to veneration were the reason of a right of inheritance, the succession would devolve on the spiritual preceptor before the father; since it is said "Of him who is the natural parent, and him who gives holy knowledge, the giver of the sacred science is the more venerable father:" and paternal uncles and the rest would inherit in preference to a younger brother or a nephew. Therefore, the mother's right of succession is *after* the father.—*Dá. Bhá.*, Chap. XI, Sect. iv, § 3. Authority.

The author of the *Viváda-bhangárnava* has founded his opinion almost on the same grounds. He says:—"Title to respect is no cause of inheritance; were it so, who could take the estate while both parents exist? But benefits conferred by his own act, and near relation by the funeral cake, are the grounds on which rests the claim of an heir: now, the father is superior by the benefits which he confers; therefore he has the right of succession, even though the mother be living."—*Coleb.* Dig., Vol. III, p. 505.

Such is also the opinion of the other authorities of the Bengal school.—See *Dá. Ta.*, Chap. XI, § 28,—*Coleb.* Dig., Vol. III, p. 505, and the other law books of this country. Remark.

The terms "mother, &c." bear their original sense of 'his own natural mother,' 'father's natural mother,' and 'grandfather's natural mother.'—*Dá. Bhá.*, Chap. XI, Sect. vi, § 3. Consequently,—

68. A step-mother is not entitled to inherit from her rival's son. *Vyavasthá.*

Vide Precedents, pages 204, 205, 214.

Since the term 'mother' intends the natural parent, it cannot also mean a step-mother. For a word employed once cannot bear the literal and metaphorical senses at the same time.—*Dá. Bhá.*, Chap. III, Sect. ii, § 3. Authority.

69. The mother, if unchaste, is not entitled to inherit. *Vyavasthá.*

Vide Precedents, pages 200—203, 233.

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Reason. As the term *patní* (widow) is employed with a general import embracing any female entitled to inheritance,* and as an adulterous wife or widow has no heritable right,† *a fortiori* the unchaste mother has no such right, her right being weaker than that of a widow. *Vide* Precedents, pages 104, 181—185, 202—204.

Vyavasthá. **70.** The mother too without a legal necessity or any of the acts, religious or secular, mentioned in the widow's succession,‡ is incompetent to alienate her son's heritage, which, after her enjoyment and demise, is to be inherited by the next heir of her son, and not by her own heir.

Vide Precedents, pages 36, 104, 202, 205—209.

Reason. Because the mother's heritable right being inferior to, and her claim weaker than, that of the widow, *a fortiori* she is under the same restrictions as are imposed upon the widow, and can have only such liberties as granted to her. See Precedents, pp. 104, 202, 203, 209, 212, 213.

SUCCESSION OF THE FATHER'S SON, GRANDSON, GREAT-GRANDSON AND DAUGHTER'S SON, &C.

Vyavasthá. **71.** In default of the mother, the brother takes the heritage of his brother.§

Vide Precedents, pages 215, 217, 225, 253, 263.

Authority. The texts of YÁJNAVALKYA and VISHNU, cited at pages 29 and 30. However,—

Vyavasthá. **72.** Of the brothers of the whole blood and half blood, the former inherits to the exclusion of the latter.

Vide Precedents, pages 215, 217—228, 263.

Authority. Here again a brother of the whole blood has the first title. *Dá. Bhá.*, Chap. XI, Sect. v, § 9.

Annotations.

71, 72. In default of father and mother, brothers inherit.—Macn. H. L., Vol. I, p. 26.

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* See *ante*, pages 66, 70.

† See *Vyavasthás* 23 and 56 and the authorities, &c., relating to them.

‡ See *ante*, pages 47—49, 52—55.

§ *Dá. Bhá.*, Chap. XI, Sect. v, § 8 ;—*Dá. Kra. Sang.*, Sect. vii, § 1.

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On failure of the mother, the succession goes to the uterine or whole brother, who offers three funeral oblations to the father, grandfather and great-grandfather of the deceased owner in which he participates.—*Dá. Kra. Sang.*, Sect. vii, § 1. Authority.

In their (the parents') absence, the brothers (succeed). Here too, the plural number is used for the purpose of showing that the succession is different according as the brothers are uterine, consanguine and re-united.—*Dá. Ta.*, Chap. XI, § 29, p. 67. Authority.

73. If there be no uterine or whole brother, the half brother inherits. *Vyavasthá.*

Vide Precedents, pages 217—228, 253.

If there be no uterine or whole brother, the half brothers of the same class with the deceased are entitled to the succession, since they also offer three funeral oblations to the father and the other ancestors above named of the deceased owner in which he participates, and because the text of YÁJNAVALKYA specifies 'Both parents, *brothers* likewise,' (*ante* p. 29), the succession devolves on sons born of a different mother, for they are begotten by the same father.—*Dá. Kra. Sang.*, Sect. vii, § 2. Authority.

Hence, of a uterine brother, and one born of the step-mother though they sprung from the same father, the uterine brother alone succeeds, but not the step-brother; because the former presents oblations to six ancestors which the deceased was bound to offer; but the latter offers oblations to three paternal ancestors only.—*Dá. Ta.*, Chap. XI, § 30, p. 67. Authority.

The succession of the half brother, (between the whole brother and the brother's son*) as affirmed by SRÍ-KARA and VISHWA-RÚPA, should be acknowledged; for he is inferior to the whole brother, who presents oblations to six ancestors which the deceased was bound to offer; while the half brother only presents three oblations to the father and others in which the deceased participates: and he is superior to the nephew, because he surpasses him in the conferring of benefits, since he offers three oblations in which the deceased participates; while he (the nephew) offers two oblations in which the deceased participates.†—*Dá. Bhá.*, (Sans.), page 212. Authority.

Therefore, if whole brothers and half brothers only (not reunited brothers of either description‡) be the claimants, the succession devolves exclusively on the whole brothers. Authority.

* SRÍ-KRISHNA.

† Mr. Colebrooke's translation of the above passage is not accurate, as will be manifest by comparing the same with its original (Sanskrit).

‡ ACHYUTA and SRÍ-KRISHNA.

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Accordingly *Vrihat* MANU says—"If a son of the same mother survive, the son of her rival shall not take the wealth. This rule shall hold good in regard to the immovable estate(*a*). But, on failure of him (the half brother) may take the heritage."—*Dá. Bhá.*, Chap. XI, Sect. v, § 34.

Explanation. (*a*) This rule shall hold good in regard to the immovable estate.] This rule is relative to divided immovables. For, immediately after treating of such (property,) YAMA says, "The whole of the undivided immovable estate appertains to all the brethren; but divided immovables must on no account be taken by the half brother."*—*Ibid.*, § 35.

Remark. The whole and half brothers do, however, inherit simultaneously in the two exceptional cases stated in the two following *Vyavasthás*, and not in any other case.

Vyavasthá. **74. The whole and half brothers are simultaneously as well as equally entitled to the immovable property that may have remained undivided.**

Vide Precedents, pages 217—228.

Authority. YAMA:—Whatever immovable property (remains) undivided, that shall be (the property) of all(*a*); the divided immovables must on no account be taken by the half brothers.—See *Coleb.* Dig., Vol. III, p. 517, and *Dá. Bhá.*, Chap. XI, Sect. v, § 35. See also the following remark.

Explanation. (*a*) "All,"—that is, all the brothers, whether of the whole or half blood.—*Dá. Bhá.*, Chap. XI, Sect. v, § 36.

Remark. The original of the first hemistich of the text of YAMA, of which the above is an accurate translation, runs thus:—"*Avibhaktam Sthávaram Yat, Sarveshámeva tatbhavet.*" Of this Mr. Colebrooke has made two different translations, which are as follow:—1, "The whole of the undivided immovable estate appertains to all the brethren."—(*Dá. Bhá.*, Chap. X, Sect. v, § 35, above quoted.) 2, "Immovable undivided property shall be the heritage of the brothers." (*Coleb.* Dig., Vol. III, p. 517.) In the first version the learned translator has rendered the word "*Yat*" (which here cannot but mean 'whatever,') by "*the whole,*" and in the second, he has omitted to render not only the said word "*Yat,*" but also its correlative "*tat* (that)," which two are the most important words contained in the text in question, and has thus altered the sense of the text from its correct interpretation or exposition given by his author, JAGANNÁTHA. The same is as follows:—

* See, however, the remarks on the different translations of this text.

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JAGAN-NÁTHA :—If any immovable property of divided heirs, common to brothers by different mothers, have remained undivided, being held in coparcenary, the half brothers shall have equal shares with the rest; but the uterine brother has the sole right to divided property, movable and immovable. The text of *Vrihat* MANU likewise intimates the same, by alluding to distinction in respect of immovable property, when the subject proposed was already ascertained by the former part of the text. This maxim, say the lawyers, should be likewise adduced in the case where no re-union has taken place.—*Coleb.* Dig., Vol. III, p. 518. Authority.

The text of *Vrihat* MANU above alluded to is as follows :—

"If a brother by the same mother be living, one by a different mother shall not take the estate; the law is the same, even though it be immovable property; but on failure of the whole brother, one of the half blood may indeed possess the estate."—*Coleb.* Dig., Vol. III, page 509.

75. In the case of the whole brother being unreunited and the half brother reunited in parcenary, they inherit simultaneously as well as equally. See Re-union in the Book on Partition. *Vyavasthá.*

Vide Precedents, pages 217—228.

The whole brother who is not reunited in parcenary, and the half brother who is associated, should divide the succession.—*Dá. Bhá.*, Chap. XI, Sect. v, § 15. Authority.

Where an associated half brother, and an unassociated whole are the competitors for the succession, it devolves equally on both of them, in conformity with the text,—"A half brother being again associated may take the succession."—*Dá. Kra. Sang.*, Chap. I, Sect. vii, § 4. Authority.

76. In default of brothers of the whole blood and half blood, brothers' sons inherit from their deceased uncle. *Vyavasthá.*

Vide Precedents, pages 253—257.

The texts of YÁJNAVALKYA and VISHNU. Cited at pages 29 and 30. Authority.

Annotations.

75. But if a man die leaving an uterine brother separated, and a half brother associated or re-united, these two will inherit the property in equal shares.—Macn. H. L., Vol. I, p. 26.

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Authority. A brother's son has not an equal claim with a brother,—for, a brother who is giver of six funeral cakes or of three (if he be son of the same father only), which it was incumbent on the late proprietor to offer, is superior to the brother's son, who is giver of two funeral cakes which the late proprietor was bound to present to his father and paternal grandfather. JÍMÚTA-VÁHANA concurs herein.—*Coleb.* Dig., Vol. III, p. 518.

Vyavasthá. **77. Of the nephews also, the whole brother's son inherits in the first instance.**

Vide Precedents, pages 216, 253, 254.

Authority. In default of brothers, brother's son of the whole blood is the successor, and not the nephew of the half blood who confers less benefits compared with the brother's son of the whole blood, since the mother and grandmother of the deceased owner do not participate in the oblations presented by the nephew of the half blood to the father and grandfather* (of the deceased owner).—*Dá. Kra. Sang.*, Sect. viii, para. 1.

Authority. MANU:—If among the several brothers of the whole blood, one have a son born, MANU pronounces them all fathers of a male child by means of that son.—Chap. X, *verse* 182.

The nephew's succession must, however, be understood to be on failure of heirs down to the brother, in conformity with YÁJNAVALKYA's text—"The wife and daughters, also both parents, brothers likewise, and their sons," &c. (*Ante*, page 29.) KULLÚKA BHATTA.

Annotations.

76,78. In default of brothers, their sons inherit in the same order, but in regard to their succession, there is this peculiarity, that if a brother's sons, whose father died previously to the devolution of the property, claim by right of representation, they take *per stirpes* with their uncle, being in that case grandsons inheriting with a son; but when the succession devolves on the brother's sons alone as nephews, they take *per capita* as daughters' sons do.—Macn. H. L., Vol. I, p. 27.

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* The above is according to the following text:—"A mother tastes with her husband the funeral repast consisting of oblations to the *manes*; and the paternal grandmother with her husband; and the paternal great-grandmother with her's.—*Vide Dá. Bhá.*, Chap. XI, Sect. vi, § 3.

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78. After the son of the whole brother, the succession devolves on the son of the half brother. *Vyavasthá.*

Vide Precedents, pages 253, 254.

Indeed the son of the half brother, being a giver of oblations to the father of the late proprietor, together with his own grandmother, to the exclusion of the mother of the late owner, is inferior to a son of the whole brother (who is a giver of oblations to the grandfather in conjunction with the mother of the deceased*).—*Dá. Bhá.*, Chap. XI, Sect. vi, § 2. Authority.

Nor can it be pretended that the step-mother, grandmother and great-grandmother take their places at the funeral repast, [in consequence of ancestors being deified†] with their wives: for the terms "mother" [grandmother and great-grandmother†] &c., [in such texts as the following*] bear their original sense of 'his own natural mother,' 'father's natural mother,' and 'grandfather's natural mother;' and it is by those terms that they are described as taking their places at the funeral repast. Thus it is said, "A mother tastes with her husband the funeral repast consisting of oblations to the manes; and the paternal grandmother with her husband; and the paternal great-grandmother with her's." But the introduction of step-mothers and the rest to a place at the periodical obsequies, is expressly forbidden. Thus the sage declares, "Whosoever die, whether man or woman, without male issue, for such person shall be performed funeral rites peculiar to the individual, but no periodical obsequies."—*Dá. Bhá.*, Chap. XI, Sect. vi, § 3. Authority.

79. If there be no brother's son, the brother's grandson is heir.‡ *Vyavasthá.*

Vide Precedents, pages 253—256.

Both, because he presents one funeral oblation [namely, to the deceased owner's father, *i.e.*, his own great-grandfather] in which the deceased owner participates, &c., and because he is within the degree of relationship, termed "*Sapinda.*"—*Dá. Kra. Sang.*, Chap. I, Sect. ix, § 1. Authority.

80. Here likewise the distinction of the whole blood, and of the half blood, as in the instance of brother's sons, must prevail.‡ *Vyavasthá.*

Vide Precedents, pages 253—256.

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* Srí-krishna. † Srí-krishna and Achyuta.

‡ *Dá. Kra. Sang.*, Sect. ix, § 3.—*Coleb.* Dig., Vol. III, pp. 523, 524, 528. See Coleb. *Dá. Bhá.*, pp. 224, 225, post pp. 89, 90.

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Vyavasthá. **81.** The nephews and their sons take *per capita*, and *not per stirpes*. See Partition.

Vide Precedents, pages 254, 262.

Remark. In fact, all heirs take *per capita*, except the grandsons and great-grandsons in the male line, who under special texts take *per stirpes*. See *ante* pages 20—22.

Authority. But the brother's great-grandson, though a lineal descendant of the owner's father, is excluded by the paternal uncle; for he is not a giver of oblations, he is distant in the fifth degree. Thus MANU says: "To three must libations of water be made, to three must oblations of food be presented: the fourth in descent is the giver of those offerings: but the fifth has no concern with them." By this passage the fifth in descent is debarred.*—*Dá. Bhá.*, Chap. XI, Sect. vi, § 7.

Vyavasthá. **82.** On failure of the brother's grandson in the male line, the succession goes to the father's daughter's son.†

Vide Precedents, pages 229—254, 257—262.

Authority. For he presents three funeral oblations, namely, to the father, paternal grandfather and paternal great-grandfather of the deceased owner, *i.e.*, to his own maternal grandfather, maternal great-grandfather, and maternal great-great-grandfather. [According to ÁCHÁRYA CHUDÁMANI, the son of the proprietor's own sister, and the son of his half sister, have an equal right of inheritance.]—*Dá. Kra. Sang.*, Sect. x, § 1.

Authority. On failure of heirs of the father down to the great-grandson, it must be understood, that the succession devolves on the father's daughter's son (in preference to the uncle‡); in like manner as it descends to the owner's daughter's son (on failure of the male issue, in preference to the brother). The succession of the grandfather's and great-grandfather's lineal descendants, including the daughter's son, must

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Annotations.

82. In default of brother's grandsons, sister's sons inherit, according to the law of Bengal.—Macn. H. L., Vol. I, p. 28.

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* See *Dá. Kra. Sang*, Sect. ix, § 2; and *Coleb.* Dig., Vol. III, pp. 127, 128. The fifth in descent does, however, succeed as a *Sakulya* on failure of the givers of oblations. This will be afterwards shown.

† *Dá. Bhá.*, Chap. XI, Sect. vi, § 8;—*Dá. Kra. Sang.*, Sect. x, § 1.

‡ ACHYUTA and SRÍ-KRISHNA.

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be understood in a similar manner, according to the proximity of the funeral offering: since the reason stated in the text, "for even the son of a daughter delivers him in the next world, like the son of a son,"* is equally applicable; and his father's or grandfather's daughter's son, like his own daughter's son, transports his *manes* over the abyss, by offering oblations of which he may partake. Accordingly MANU has not separately propounded their right of inheritance: for they are comprehended under the two passages, "To three must libations of water be made, &c.;"* and "To the nearest kinsman (*sapinda*) the inheritance next belongs."†—*Dá. Bhá.*, Chap. XI, Sect. vi, § 8—10.

Remark.

Although the succession ought previously to devolve on the sister, as it goes to the daughter before the daughter's son, nevertheless she is excluded from the succession, because she is no giver of oblations at the periodical obsequies, being disqualified by sex. But the daughter's right of inheritance before the daughter's son takes effect under the special provision of the text. "As a son, so does the daughter of a man proceed from his several limbs," &c. (See *ante*, page 62.) SRÍ-KRISHNA'S Commentary on the *Dáya-bhága*, Sanskrit, page 223.

Remark.

BOUDHÁYANA, after premising "a woman is entitled," proceeds:—"not to the heritage; for females, and persons deficient in an organ of sense or member, are deemed incompetent to inherit." The construction of this passage is, a woman is not entitled to the heritage. But the succession of the widow and certain others (*viz.*, the daughter, the mother, and the paternal grandmother), takes effect under express texts, without any contradiction to this maxim.—*Dá. Bhá.*, Chap. XI, Sect. vi, § 11.

Vyavasthá.

83. The son of the late proprietor's own sister, and the son of his half sister, have an equal right of inheritance. See *ante*, p. 84 and post pp. 89, 90.

Vide Precedents, page 160.

Authority.

In the succession of brother's sons a distinction between the whole and half blood must be understood, not in the case of daughter's sons. But lawyers consider it as the opinion of JÍMÚTA-VÁHANA, that, in the succession of the sons of the father's daughters and so forth, a distinction is taken between uterine and half sisters. Herein SRÍ-KRISHNA TARKÁLANKÁRA does not acquiesce, because no law is found expressly declaring the participation of a maternal grand-

* MANU, Chap. IX, *v.* 139. † MANU, Chap. IX, *v.* 186, 187.

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mother in the oblation-cake offered to the maternal grandfather.—*Coleb.* Dig., Vol. III, p. 528.

Vyavasthá. **84. Only those of the father's daughter's sons and other relations (enumerated in the order of succession), who survive the owner or his female heir in succession, or who remain *in utero* at the time of his or her death, are entitled to inherit.**

Not those who are conceived after the death of the owner or his female heir in succession, their heritable right not being acknowledged by JÍMÚTA-VÁHANA and the other authorities of the Bengal school.

Vide Precedents, pages 3, 233—254.

ORDERS OF SUCCESSION ACCORDING TO THE DÁYA-BHÁGA, DÁYA-TATTWA, SRÍ-KRISHNA'S COMMENTARY ON THE DÁYA-BHÁGA, DÁYA-KRAMA-SANGRAHA AND VIVÁDA-BHANGÁRNAVA, WITH REMARKS ON THE DIFFERENCES OR DISCREPANCIES EXISTING BETWEEN THEM.

Remark. The *Dáya-bhága, Dáya-tattwa,* SRÍ-KRISHNA'S Commentary on the *Dáya-bhága,* and his *Dáya-krama-sangraha,* authorities of the greatest weight, and the *Viváda-bhangárnava,* (the translation whereof is commonly called 'Colebrooke's Digest,') also the other law books of this country, concur as to the order of the (first) twelve successions, from the son to the father's daughter's son; but after this, they differ in some instances in the order of succession, as well as in their number. All these are given below, with remarks on the order and number of the successors, in which each of the works differs from the rest.

ORDER OF SUCCESSION ACCORDING TO THE DÁYA-BHÁGA.

Vyavasthá according to the *Dáya-bhága.* 85. On failure of heirs of the father down to the great-grandson, it must be understood that the succession devolves on the father's daughter's son, in like manner as it descends to the owner's daughter's son. The succession of the grandfather's and great-grandfather's lineal descendants, including the daughter's son, must be understood in a similar manner, according to the proximity of the funeral offering. On failure of lineal descendants of the paternal great-grandfather, down to the daughter's son, the property devolves on the maternal uncle and the rest. On failure of such

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kindred in this degree, the distant kinsman (*Sakulya*)* is heir.—The distant kinsman is one who shares the divided oblation,—as the grandson's grandson or other descendant within three degrees reckoned from him; or as the offspring of the grandfather's grandfather or other remoter ancestor. Among these the grandson's grandson and the rest are nearest. On failure of such, the offspring of the grandfather's grandfather and the rest inherit. If there be no such distant kindred, the *Samánodakas* or kinsmen allied by common libation of water, must be admitted to inherit. On failure of these, the spiritual preceptor is the successor; in default of him, the pupil is heir; on failure of him likewise, the fellow-student. In default of these, persons bearing the same family name (*gotra*) are heirs; on failure of them, persons descended from the same patriarch (*pravara*) are the successors. On failure of all heirs as here specified, let the *Bráhmanas* take the estate. In default of them, the king shall take the property, excepting, however, the property of a *Bráhmana*. A failure of descendants from the same patriarch and of persons bearing the same family name, as well as of *Bráhmanas*, must be understood as occurring when there are none inhabiting the same village: else an escheat to the king could never happen.—*Dá. Bhá.*, Chap. XI, Sect. vi, § 8—27.

If the learned are yet unsatisfied (with relying on reason† for the ground of the law of inheritance,) this doctrine may be derived from express passages of law.—*Dá. Bhá.*, Chap. XI, Sect. vi, § 33. **Remark.**

The goods of a hermit, of an ascetic, and of a professed student, let the spiritual brother, the virtuous pupil, and the holy preceptor, take. On failure of these, the associate in holiness, or person belonging to the same order, shall inherit. The student must be understood to be a professed one; for, abandoning his father and relations, he makes a vow of service and of dwelling for life in his preceptor's family. But the property of a temporary student would be inherited by his father and other relations.—*Ibid.*, paras. 35, 36. ***Vyavasthá.***

Thus has the distribution of the property of one who leaves no male issue been explained.—*Ibid.*, § 37. **Conclusion.**

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* Three ancestors, from the grandfather's grandfather upwards, and three descendants from the grandson's grandson downwards, are denominated *Sakulyas*, as partaking of the divided oblations, since they do not participate in the same offering.—*Dá. Bhá.*, Chap. XI, Sect. i, § 38.

† ACHYUTA and SRÍ-KRISHNA.

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Remark. The writer of this work, JÍMÚTA-VÁHANA, is the founder of the Bengal school, being the author of the doctrines which it has adopted. All that are laid down by him are, with a very few exceptions, respected; and his texts are quoted, and references are made to them, in almost all the compilations and Digests in Bengal.

ORDER OF SUCCESSION ACCORDING TO THE DÁYA-TATTWA.

Vyavasthá according to the Dáya-tattwa.

86. On failure of heirs of the father down to his daughter's son, the paternal grandfather succeeds; failing him, the paternal grandmother; in default of her, the offspring of the grandfather, including his daughter's son; (in their default) the paternal great-grandfather, paternal great-grandmother, and also their offspring, succeed in like manner. On failure of persons who are givers of oblations in which the deceased may participate, the succession devolves on the *Bandhus*,—that is, the maternal grandfather, maternal uncle, and the rest. Here also, as in the instance of father and paternal kinsmen, if the maternal grandfather be living, he is heir; on failure of him, the maternal uncle and other maternal kindred succeed in order. On failure of these, the distant kinsmen (*Sakulyas*), who share the divided oblation, are heirs; *viz.*, the grandson's grandson, his son, and his son's son, who are *Sakulyas* in the descending line; and the offspring of the grandfather's grandfather and the rest. By the word '*Bándhaváh*,' used in the text of VRIHASPATI, is meant that the near cognate kindred of the father and mother are heirs. The *Bándhavas* are as follow:—"The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's maternal aunt, the sons of his mother's paternal aunt, and the sons of his mother's maternal uncle, must be reckoned to be his mother's cognate kindred.—*Dá. Ta.* Sans., pp. 61, 62.

Remark. The author of this book has in general strictly followed the doctrines of JÍMÚTA-VÁHANA. On a few points, however, he has differed from his master; that is, he has supplied some deficiencies, added some new heirs, and omitted to mention things which are to be found in the *Dáya-bhága*, and are very current. Thus in the order of succession, the author has, to the heirs designated by JÍMÚTA-VÁHANA, added the maternal grandfather, and, as *Bándhavas*, the sons of the late proprietor's mother's sister, the sons of his father's maternal aunt, the sons of his

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mother's maternal uncle, the sons of his mother's maternal aunt, the sons of his mother's paternal aunt, and the sons of his mother's maternal uncle. Of these, the sons of the late proprietor's father's maternal uncle and aunt, and the sons of his mother's maternal uncle and aunt, are not admitted as heirs by SRÍ-KRISHNA and JAGAN-NÁTHA. The author has, moreover, omitted the spiritual preceptor, and the rest, who are declared heirs by JÍMÚTA-VÁHANA and others.—See Golap Chandra Sarkar Shastri's translation of the *Dáya-tattwa*, Chap. XI, Cls. 64—79.

ORDER OF SUCCESSION ACCORDING TO SRÍ-KRISHNA'S COMMENTARY ON THE DÁYA-BHÁGA.

Vyawstha according to SRÍ KRISHNA'S Commentary on the *Dáya-bhága.*

87. On failure of the brother's grandson, the father's daughter's son is the successor: whether he be the son of a sister of the whole blood, or the son of a sister of the half-blood. If there be none, paternal grandfather is heir; failing him, the paternal grandmother; in her default, the father's own brother is heir; in default of such, the father's half-brother. On failure of these, the succession devolves in order on the son of the father's whole brother, on the son of his half-brother, on the grandson of his whole brother, and on the grandson of his half-brother. In default of these, the paternal grandfather's daughter's son inherits; in this instance also, the son of the father's whole sister inherits first; on failure of him the son of the father's half-sister. Such is also the case in the succession of the sons of the great-grandfather's daughters. On failure of these heirs, the paternal great-grandfather is the successor. If he be dead, the paternal great-grandmother inherits. If she be deceased, the paternal grandfather's own brother, his half-brother, their sons, and grandsons, and the great-grandfather's daughter's son are successively heirs. On failure of all such kindred who present oblations in which the deceased owner may participate, the succession devolves on the maternal grandfather and uncle and the rest who present oblations which the deceased was bound to offer. The maternal grandfather is, however, entitled to inherit first; on failure of him the heritage passes successively to the maternal uncle, his son, and grandson. On failure of these, the right of inheritance accrues to the remote kindred (*Sakulya*) in the descending line, who present the residue of oblations to ancestors with whom the deceased owner may participate: namely, to the grandson's grandson and other descendants for three generations in succession; in default of these, the inheritance returns to the ascending line of distant kindred, who enjoy the residue of the oblations offered by the deceased owner; namely, to the paternal grandfather's grandfather and other ancestors, and their offspring in the order of proximity.

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On failure of these, the succession devolves on the *Samánodakas* or kindred allied by a common libation of water. In default of them, the spiritual preceptor is heir; or, if he be dead, the pupil; on failure of him, the fellow student in theology. If there be none, the inheritance devolves successively on a person bearing the family-name and on one descended from the same patriarch, being in either case an inhabitant of the same village. On failure of all relatives as here specified (the property devolves on *Bráhmanas* learned in the three *Vedas* and endowed with other requisite qualities; and, in default of such,) the king shall take the escheat, excepting however the property of a *Bráhmana*. But the *Bráhmanas*, who have read the three *Vedas* and possess other requisites, shall take the wealth of a deceased *Bráhmana*. So the goods of an anchoret shall devolve on another hermit considered as his brother and serving the same holy place. In like manner the goods of an ascetic shall be inherited by his virtuous pupil: and the preceptor shall obtain the goods of a professed student. But the wealth of a temporary student is taken by his father or other heir. Such is the abridged statement of the law of inheritance.*

Remark. This is the most celebrated of the glosses on the *Dáya-bhága* of JÍMÚTA-VÁHANA. It has well illustrated the text by expressing what was implied by the terms *ádi* (&c.,) and *anta* (as far as,) and by expressing the distinction between the relatives of the whole and the half-blood, and supplying the omissions and deficiencies. The commentator has generally confirmed the positions of the text, but sometimes modified or amended them. For instance, among the grandfather's and great-grandfather's descendants (in the male line) he expressly gives preference to those of the whole blood. In the succession of *Sakulyas*, JÍMÚTA-VÁHANA laid down that, "the grandson's grandson, and the rest are the nearest. On failure of such, the offspring of the paternal grandfather's grandfather inherits;" but did not explicitly recognise the heritable right of the *Sakulyas* in the ascending line, *i. e.*, paternal grandfather's grandfather and the father and grandfather of the latter. But the commentator has modified or amended it, saying: "On failure of these, the right of inheritance accrues to the kindred in the descending line, namely, to the grandson's grandson, and other descendants for three generations in succession. In default of these, the inheritance returns to the ascending line of the distant kindred; namely, the grandfather's grandfather and the rest, and their offspring in the order of proximity." Between the paternal great-grandfather's daughter's son and the maternal uncle the commentator has interposed, as heir, the maternal grandfather, who is

* The above is a true translation of SRÍ-KRISHNA's recapitulation in his commentary on the *Dáya-bhága*, Sanskrit, pages 242, 243.

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not designated as such by JÍMÚTA-VÁHANA. Further, the author says: "a failure of descendants from the same patriarch and of persons bearing the same family-name, as well as of *Bráhmanas*, must be understood as occurring when there are none inhabiting the same village; else an escheat to the king would never happen." The commentator, leaving out the condition of a *Bráhmana* being an inhabitant of the same village, says: "the inheritance devolves successively on a person bearing the family-name, and on one descending from the same patriarch, in either case being an inhabitant of the same village. On failure of all relatives as here specified, the king shall take the escheat, excepting however the property of a *Bráhmana*. But the property of a *Bráhmana* shall be taken by *Bráhmanas*, who have read the three *Vedas* and possess other requisite qualities."*

Remark.

In his commentary on the *Dáya-bhága*, SRÍ-KRISHNA differs from his original treatise *Dáya-krama-sangraha* in maintaining the distinction between the whole and the half-blood among the brothers of the father and grandfather, and their descendants, and in not recognising as heirs the sons of the daughters of the late proprietor's own brother, of his father's brother, and also of his grandfather's brother; the maternal grandfather's father, his son, grandson, great-grandson, and daughter's son, and the maternal grandfather's grandfather, his son, grandson, great-grandson, and daughter's son who are designated as heirs in the *Dáya-krama-sangraha*; and in not declaring that a *Bráhmana* must be an inhabitant of the same village, that on failure of a qualified *Bráhmana*, in respect to the wealth of a *Bráhmana*, a *Bráhmana* residing in another village is the successor.

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* Colebrooke's translation of SRÍ-KRISHNA'S recapitulation in the commentary on the *Dáya-bhága* differs from the text of that recapitulation in omitting the succession of the paternal great-grandfather, and paternal great-grandmother, in inserting the succession of the paternal grandfather and grandmother after their own daughter's son, and in interposing the mother's sister's son between the maternal uncle and his son, as also in some other respects. Such difference and disagreement may be attributed to the mistake in the manuscript copy or copies from which that translation was made. I therefore could not all along adopt Mr. Colebrooke's translations, but had to retranslate the text from the last edition of the *Dáya-bhága*. And the reason why I have preferred and adopted the last edition is given in the last Note at page 50. The omission of the great-grandfather and great-grandmother, and insertion of the grandfather and grandmother in the above place are evident mistakes and corruptions, inasmuch as in the original the paternal grandfather and grandmother are recognised as heirs after the father's daughter's son, and the paternal great-grandfather and great-grandmother are put in the place where their son and daughter-in-law are inserted in the translation of the recapitulation. As to the interposition of the maternal aunt's son it is admitted to be a mistake by the translator himself, who remarks that the son and grandson of the maternal uncle ought to precede the son of the maternal aunt, by the analogy of inheritance on the father's side. (See Coleb. *Dá. Bhá.*, page 226.)

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ORDER OF SUCCESSION ACCORDING TO THE VIVÁDA-BHANGÁRNAVA.

Vyavasthá according to the Vivádabhangárnava.

88. On failure of the father's issue including daughter's son, the paternal grandfather is heir to the property; on failure of him, the paternal grandmother. On failure of them, their issue, including the son of a daughter, shall inherit; and in the succession of the paternal grandfather's son, grandson, and great-grandson, the same distinction must be admittted as before, in respect of their relation to the (late proprietor's) father by the whole or half-blood; but no distinction is taken in the case of daughters' sons. Next the paternal great-grandfather is heir; in default of him the paternal great-grandmother; on failure of her, the descendants of the paternal great-grandfather, including his daughter's son, as before, successively claim the inheritance. Here again a distinction must be admitted in the succession of the paternal grandfather's son, grandson, and grandson's son, according to their relation to the paternal grandfather by the whole or the half-blood, but not in the instance of his daughter's son. On failure of them, a more distant kinsman is heir, namely, the maternal grandfather, maternal uncle, his son, and son's son, the maternal great-grandfather, his son, son's son, and grandson's son; the father of the maternal great-grandfather, his son, son's son, and grandson's son. On failure of the last respectively the next in order is heir. Again, their daughter's sons have a title as givers of funeral cakes to the maternal grandfather, to his father, and to the father of the maternal great-grandfather. In this sense does YÁJNAVALKYA use the term *Bandhu*. Such is the rule approved of by SRÍ-KRISHNA TARKÁLANKÁRA, who follows the opinion of JÍMÚTA-VÁHANA. It should be here remarked that the sons of the son's and the grandson's daughters and the sons of a brother's and nephew's daughters, and so forth, claim succession in the order of proximity, before the maternal grandfather: for they also confer benefits by the oblation of the funeral cakes; on failure of them, a distant kinsman (*Sakulya*) is heir. Three persons ascending from the father of the paternal great-grandfather, and three descending from the son of the great-grandson, do not participate in the same funeral cake: they are therefore pronounced *Sakulya*, sharing divided oblations. In the first place, the son of the great-grandson is heir, next the grandson of the great-grandson, and after him the great-grandson of the great-grandson in the male line. On failure of these, the paternal grandfather's grandfather: if he be dead, his daughter's son and other descendants (to the third degree) who are givers of

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funeral cakes in the *Párvana* inherit in order; in default of them, the son, grandson, and great-grandson of the great-grandson of the grandfather's grandfather in the male line have successive claims as givers of the remains of funeral cakes to the paternal grandfather's paternal grandfather. On failure of them, the paternal great-grandfather's paternal grandfather is heir; if he be dead, his son, grandson, and great-grandson, his daughter's son, and the son, grandson, and great-grandson of the great-grandson (in the male line) have successive claims as before. On the failure of them, the paternal great-grandfather's paternal great-grandfather, his son, grandson, and great-grandson, his daughter's son, and the son, grandson, and great-grandson of the great-grandson (in the male line) similarly inherit in order. On failure of all these, the *Samánodakas*, or persons connected by an equal libation of water, have a right to inheritance: the relation of *Samánodaka* extends to the fourteenth person. On failure of them, the spiritual preceptor is heir; if he be dead, the pupil; in default of him, the fellow-student; then the descendants from the same ancient sage claim the succession; on failure of them, men sprung from the same primitive stock. On failure of heirs including kinsmen sprung from the same branch of venerable stock, the succession devolves on *Bráhmanas*. The want of heirs descended from the same holy sage, or from the same company of *rishis*, and the failure of *Bráhmanas* must be understood to be the non-existence of any such persons in the same village or town. MANU declares that on failure of virtuous *Bráhmanas* residing in the same town, the inheritance of a *kshatriya* and the rest shall escheat to the king. But the property of a *Bráhmana* must never be taken by the king, consequently, on failure of honest *Bráhmanas*, he must give the property of a *Bráhmana* to *Bráhmanas* in general. The spiritual preceptor shall take the property of the perpetual student in theology; the virtuous pupil, versed in the study of revelation concerning the supreme soul, and in preserving that sacred science, shall take the estate of an anchorite; and the brother by religious duties, being púpil of the same spiritual father, takes the wealth of a hermit. 'The brother by religious duties' is one familiarly known as brother of the deceased. The subsequent term '*eka-tírthî*' may signify, belonging to the same order of devotion. (*Vide Coleb.* Dig., Vol. III, pp. 528—547.)

Remark. In the order of succession this book differs from both the works of SRÍ-KRISHNA in intimating the opinion that the sons of the son's and grandson's daughters, and the son of a nephew's daughter, and so forth, claim succession in the order of proximity,

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before the maternal grandfather, and in inserting the son, grandson, and great-grandson of the great-grandson of the paternal grandfather's grandfather in the male line before the paternal great-grandfather's grandfather; the son, grandson, and great-grandson of the great-grandson of the paternal great-grandfather's paternal grandfather before the paternal great-grandfather of the paternal great-grandfather; and in some other respects.*

Remark. Amidst this disagreement of authors, it is considered proper to follow the order of SRÍ-KRISHNA'S *Dáya-krama-sangraha*, making, however, the distinction of the whole and the half-blood among the descendants of the paternal grandfather and great-grandfather, as made in his commentary on the *Dáya-bhága*, and in the Digest of JAGAN-NÁTHA.† This is done in pursuance of the dictum of YÁJNAVALKYA:—"If two texts of law differ (from each other), reason, (or that which best supports it,) must in practice prevail."‡ "The *Dáya-krama-sangraha* is,"—to use the words of Mr. Colebrooke, the highest European authority on points of Hindú law,—"a good compendium of the law of inheritance according to JÍMÚTA-VÁHANA'S text," and has been preferably followed not only by the lawyers of this country, but also by the European scholars who have translated or written treatises on Hindú law. Bábú Prasanna Kumár Thákur has, in his "*Table of Succession* according to the Hindú law of Bengal," adopted the order of the *Dáya-krama-sangraha*. And in his little treatise entitled "The heritable right of *Bandhus* according to the western school," he has expressed the same opinion. Mr. Colebrooke in his translation of the *Dáya-bhága*, after showing discrepancies in the authorities current in Bengal, remarks: "Amidst the disagreement of authors, I should be inclined to give the preference to the authority of SRÍ-KRISHNA'S *Dáya-krama-sangraha;* because the order of succession on the mother's side, as there stated, follows the analogy of the rule of inheritance on the father's side."§ Sir William Macnaghten, in his book on Hindú law, says: "The above cited four authorities are of the greatest weight in the province of Bengal; and where they differ, reliance may with safety be placed on the *Dáya-krama-sangraha* of SRÍ-KRISHNA."‖ Sir Thomas Strange, in his Elements of Hindú law, quotes the above remark of Mr. Colebrooke and acquiesces therein.¶ And Mr. Elberling has followed only the order of the *Dáya-krama-sangraha*, saying: "In the following pages we shall therefore state the order of succession of SRÍ-KRISHNA in the *Dáya-krama-sangraha*."**

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* The author of the *Dáya-nirnaya* states the succession differently, *viz.*, 'First the maternal uncle; then the maternal uncle's son; next the maternal grandfather; after him, the mother's sister's son; subsequently the maternal uncle's son's son; and lastly the maternal great-grandfather.' His reasons for the above are founded on the number of oblations deemed beneficial to the deceased owner.

† *Ante*, pp. 89—93. ‡ Vide *Coleb.* Dig., Vol. III, p. 505.

§ *Dá. Bhá.*, Ch. XI, Sect. vi, p. 226. ‖ Vol. I, p. 31; Vol. II, p. 64, Note.

¶ Vol. II, pp. 257, 258. ** Elb. In., p. 79.

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It is, however, to be remarked that it has been supposed by some that the succession of the sons of the late owner's brother's daughter, father's brother's daughter and grandfather's brother's daughter, was not originally recognised in the *Dáya-krama-sangraha*, but was subsequently inserted or interpolated by some *pandits*; and the reason assigned for such alleged interpolation is, that some copies of the work did not contain the passages declaring the succession and position of those relations. To this it may be replied that the passages in question are in the printed copies of all the editions of the *Dáya-krama-sangraha*, as well as in Mr. Wynche's translation thereof. In Sir William Macnaghten's* and Sir Thomas Strange's valuable works on Hindú law also, the above-mentioned relations are mentioned as heirs according to the *Dáya-krama-sangraha*. Mr. Elberling too, who has exclusively adopted the order of succession according to the *Dáya-krama-sangraha*, has named those relations as heirs recognised in that work. Bábú Prasanna Kumár Thákur, in his two little treatises, published a short time ago, has, upon the authority of the *Dáya-krama-sangraha*, recognised the said relations as heirs. Some of the Sudder Judges also have done the same † Had there been the least suspicion of interpolation, those eminent scholars, who wrote their works after due inquiry and research, would have rejected the passages in question, or, at least, made remarks upon them as of doubtful authenticity instead of silently citing them as genuine passages of the *Dáya-krama-sangraha*; and that acute logician, JAGAN-NÁTHA, who was so fond of sophistry and finding fault with others, would not have remained silent on the point in question; but on the contrary, he has recognised the succession of the son of a brother's daughter expressly by the mention of him, and that of the other two impliedly by the use of the expression "and so forth, claim succession in the order of proximity," and has added the succession of the sons of a son's daughter, grandson's daughter and nephew's daughter,‡ assigning the same reason for their succession, (namely, the conferring of benefits by the presentation of oblations) as has been given by SRÍ-KRISHNA. Hence it is absurd to entertain the least suspicion of interpolation. It might be that the passages in question were omitted in some of the manuscript copies possessed by certain *pandits*, whose books are often erroneous and incorrect, but that is no reason for considering the passages in question as interpolations in the face of all those valid proofs of their genuineness. But even if it be granted for argument's sake that the passages in

Remark.

* See the annotations in the following page.

† *Vide* Precedents, p. 292. ‡ See *Coleb.* Dig., Vol. III, p. 530.

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question were not originally in the book, yet when they have been recognised to be genuine by, and received corroboration from, JAGAN-NÁTHA, and the learned translator of his Digest, Mr. Colebrooke, who has translated the above passages without the least exception thereto, and lastly by and from Sir William Macnaghten (1), and the other authors of eminence as above mentioned, then they can no longer be rejected but should be respected as authoritative. Hence,—

According to the *Dáya-krama-sangraha* :—

Vyavasthá. **89.** In default of the father's daughter's son, the brother's daughter's son succeeds.*

Reason and Authority. For he presents two oblation-cakes in which the deceased owner participates, namely, to his (the owner's) father and paternal grandfather.*

Vide Precedents, pages 266—288 and 292.

Annotations.

(1) The other heirs, according to the *Dáya-krama-sangraha*, are thus enumerated by Sir William Macnaghten :—

"In default of sister's sons, the inheritance is thus continued, agreeably to the doctrine of the Bengal school, as laid down in the *Dáya-krama-sangraha.* Brother's daughter's son—paternal grandfather—paternal grandmother—paternal uncle, his son and grandson—paternal grandfather's daughter's son—paternal uncle's daughter's son—paternal great-grandfather—paternal great-grandmother—paternal grandfather's brother, his son and grandson—paternal great-grandfather's daughter's son, and his brother's daughter's son.† On failure of all these, the inheritance goes in the maternal line to the maternal grandfather; the maternal uncle; his son and grandson, and daughter's son; the maternal great-grandfather, his son, grandson, great-grandson, and daughter's son; and to the maternal great-great-grandfather, his son, grandson, great-grandson, and daughter's son. In default of all these, the property goes to the remote kindred in the descending and ascending line, as far as the fourteenth in degree; then to the spiritual preceptor; the pupil; the fellow-student; those bearing the same family-name; those descended from the same patriarch; *Brahmins* learned in the *Vedas;* and lastly, to the king, to whom, however, the property of a *Brahmin* can never escheat, but must be distributed among other *Brahmins.*"—Macn. H. L., Vol. I, pp. 29—30.

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* *Dá. Kra. Sang.*, Chap. I, Sect. x, § 2. See the above annotation.

† This should be "paternal grandfather's brother's daughter's son." See *Dá. Kra. Sang.*, Chap. I, Sect. x, § 12 and 13.

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SECTION V.

On the Succession of the Paternal Grandfather, Grandmother, and their Descendants.

90. Failing the brother's daughter's son, the paternal grandfather is the successor.* *Vyavasthá.*

For, as the father is entitled to succeed on failure of the heirs of the deceased owner ending with the daughter's son, so by the rule of analogy the succession devolves on the grandfather in default of heirs down to the father's daughter's son; and because he (the grandfather) presents to the owner's great-grandfather (one) oblation-cake in which the deceased owner participates.* Reason and Authority.

91. In default of the paternal grandfather, the paternal grandmother is heir.* *Vyavasthá.*

Vide Precedents, pages 263, 288, 289.

According to Manu's text:—"Of a son dying childless the mother shall take the estate, and the mother being also dead, the paternal grandmother shall take the heritage"—as the mother succeeds on the death of the father, so by the rule of analogy the succession devolves on the paternal grandmother in default of the paternal grandfather.* Authority.

92. Failing the paternal grandmother, the succession devolves on the father's own brother. Failing him, it devolves on the father's half-brother.* *Vyavasthá.*

Vide Precedents, pages 215, 289.

For they (two) present to the paternal grandfather and great-grandfather of the late owner two oblation-cakes in which the owner participates.* Reason.

93. In default of the father's half-brother, succession devolves on the son of the father's whole brother. Failing him, it goes to the son of the father's half-brother.* *Vyavasthá.*

Vide Precedents, pages 165, 190, 214, 264.

For they (two) present to the (deceased) owner's paternal grandfather and paternal great-grandfather two oblation-cakes in which the owner participates.* Reason.

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* *Dá. Kra. Sang.*, Chap. I, Sect. x, § 3—6. See *ante*, pp. 86, 88, 89, 92, and the annotation at page 96.

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Vyavasthá. **94.** In default of the son of the father's half-brother, the right devolves on the grandson of the father's whole brother. After him, on the grandson of his half-brother.*

Reason and Authority. For they also offer to the (deceased) owner's paternal grandfather (one) oblation-cake in which the owner participates.*

Vyavasthá. **95.** In default of him (the paternal uncle's grandson) the succession devolves on the grandfather's daughter's son.*

Vide Precedents, pages 264, 265.

Reason and Authority. Because, he presents to the paternal grandfather and great-grandfather of the late owner two oblation-cakes, in which the deceased owner participates.*

Remark. Although the grandfather's daughter's son by presenting two oblation-cakes in which the owner participates confers greater benefit than the uncle's grandson, who presents but one oblation-cake in which the owner participates, yet nevertheless the right of succession devolves (in the first instance) on the uncle's grandson, because he has stronger claims by virtue of his relationship to the deceased owner in the degree termed '*(sagotra) sapinda.*'*

Authority. In the succession of the paternal grandfather's son, grandson, and great-grandson, the distinction must be admitted as before, in respect of their relation to the (late proprietor's) father by the whole or half-blood, because the paternal grandmother shares the funeral cakes offered by her descendants, and the wife of a paternal grandfather does not share in the oblations presented by the descendants of another wife of her husband: but no distinction is made in the case of a daughter's son; because the maternal grandmother does not share in the oblation-cake offered by her daughter's son.—*Coleb.* Dig., Vol. III, pp. 428, 429.

Vyavasthá. **96.** In default of the paternal grandfather's daughter's son, the paternal uncle's daughter's son succeeds.†

Vide Precedents, pages 266, 279.

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* *Dá. Kra. Sang.*, Chap. I, Sect. x, § 7, 8. See *ante*, pp. 86, 88, 89, 92.

† *Dá. Kra. Sang.*, Chap. I, Sect. x, § 9. See Elb. In., p. 83, and the annotation at page 96; see also the remarks at page 95.

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SECTION VI.

On the Succession of the Paternal Great-Grandfather, Great-Grandmother, and their Descendants.

97. Failing the paternal uncle's daughter's son, the paternal great-grandfather succeeds.* *Vyavasthá.*

Because, the (late) owner participates in the oblation offered to the paternal great-grandfather; and also because of the analogy above mentioned.* Reason and Authority.

98. Failing him, the paternal great-grandmother is entitled to succeed.* *Vyavasthá.*

Because, she shares the oblation-cake offered by her great-grandson. This observation of JÍMÚTA-VÁHANA and RAGHUNANDANA should be respected.—*Coleb.* Dig., Vol. III, page 529. Reason with Authority.

It must not be argued, that in the want of a positive text, the succession of the paternal great-grandmother is forbidden by the general maxim, "wealth was conferred for the sake of defraying sacrifices; therefore, distribute it among honest persons, not among women, ignorant men, and such as neglect their duties." A man should not affirm, of his own authority, that no such special ordinance exists; for the ocean of the law has not been traversed.—*Coleb.* Dig., Vol. III, p. 529. Remark.

99. If she be dead, the paternal grandfather's own brother, his half-brother, their sons and grandsons are *successively* heirs.* *Vyavasthá.*

Vide Precedents, page 264.

For, they present to the owner's paternal great-grandfather an oblation-cake in which the owner participates.* Reason.

100. Next succeeds the paternal great-grandfather's daughter's son.* *Vyavasthá.*

Since, he presents an oblation, in which the deceased owner participates, namely, to the owner's paternal great-grandfather.* Reason.

Here again a distinction must be admitted in the succession of the paternal great-grandfather's son, son's son, and grandson's son according to their relation to the paternal grandfather by the whole or half-blood; but not in Authority.

* See *Dá. Krá. Sang.*, Chap. I, Sect. x, § 10—12. See Elb. In., p. 80, and *ante*, pages 88, 89, 92.

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the instance of his daughter's son.—*Coleb.* Dig., Vol. III, page 529.

Vyavasthá. **101.** Next the succession devolves on the paternal grandfather's brother's daughter's son.*

Vide Precedents, pages 266—288, 292.

Reason and Authority. For, he presents an oblation in which the deceased owner participates, namely, to the owner's paternal great-grandfather.*

SECTION VII.

On the Succession of the Maternal Grandfathers and their Descendants.

On failure of any lineal descendant of the paternal great-grandfather down to the daughter's son, who might have presented oblations in which the deceased would participate; to intimate, that, in such case, the maternal uncle shall inherit in consequence of the proximity of the oblations, as presenting offerings to the maternal grandfather and the rest, which the deceased was bound to offer, Yájnavalkya employs the term "cognates *(bandhu)*." But Manu indicated it only by a passage declaratory of succession according to the nearness of the oblation. Since the maternal uncle and the rest present three oblations to the maternal grandfather and other ancestors, which the deceased was bound to offer, therefore, the property should devolve on the maternal uncle and the rest: for it is by means of wealth that a person becomes a giver of oblations.† Here also, as in the instance of father and paternal kinsmen, if the maternal grandfather be living, he is heir; on failure of him, the maternal uncle and other maternal kindred succeed in order.‡ Consequently,—

Vyavasthá. **102.** In default of the paternal grandfather's brother's daughter's son, the maternal grandfather (of the late owner) succeeds.§

Vyavasthá. **103.** In his default, the maternal uncle.§

Vide Precedents, pages 291—293.

Vyavasthá. **104.** Failing him, his son inherits.§

Vide Precedents, pages 293—296.

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* *Dá. Kra. Sang.*, Chap. I, Sect. x, § 13,—see Elb. In., p. 80, and the annotation at page 96; see also the remarks on the succession of the brother's daughter's son at pages 95, 96.

† *Dá. Bhá.*, Chap. XI, Sect. vi, § 12, 13. ‡ *Dá. T.* Sans., p. 61.

§ *Dá. Kra. Sang.*, Chap. I, Sect. x, § 14, 15.—See Elb. In., p. 80, and *ante*, pages 88, 89, 92.

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105. If he be dead, the grandson of the maternal uncle is heir.* *Vyavasthá.*

For, these two texts of MANU—"To three must libation of water be given at their obsequies: for three is the oblation-cake ordained;" and—"To the nearest *sapinda* the inheritance next belongs,†"—which declare that succession to the estate (of the deceased) is to take place according to the order of proximity of benefits conferred on the deceased owner, propound the right of the above-named to succeed; and the sole object of the introduction of the two texts above cited in a treatise on inheritance is to show that the right of succession to the estate occurs according to the order of benefits conferred on the deceased proprietor: otherwise the insertion of these texts in a treatise on inheritance would have been useless.—*Dá. Kra. Sang.*, Chap. I, Sect. x, § 15. Authority.

106. In default of the maternal uncle's grandson, the maternal grandfather's daughter's son succeeds.* *Vyavasthá.*

Vide Precedents, page 295.

107. Failing him, the maternal great-grandfather succeeds.* *Vyavasthá.*

108. In default of him, his son succeeds.* *Vyavasthá.*

109. If he be dead, the maternal great-grandfather's grandson is heir.* *Vyavasthá.*

110. In his default, the maternal great-grandfather's great-grandson succeeds.* *Vyavasthá.*

111. Then succeeds the son of the daughter of the maternal great-grandfather.* *Vyavasthá.*

112. In default of him, the maternal great-great-grandfather is heir.* *Vyavasthá.*

113. Failing him, his son succeeds.* *Vyavasthá.*

114. In his default, the grandson of the maternal great-great-grandfather.* *Vyavasthá.*

115. If he be dead, the great-grandson of the maternal great-great-grandfather is heir.* *Vyavasthá.*

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* *Dá. Kra. Sang.*, Chap. I, Sect. x, § 15—19.—Elb. In., p. 80.—See *ante* pages 86, 88, 89, 92, 96.

† MANU, Chap. IX, *vs.* 186, 187.

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Vyavasthá. **116.** Next succeeds the maternal great-great grandfather's daughter's son.*

SECTION VIII.

On Sakulyas' Right of Succession.

Vyavasthá. **117.** On failure of the heirs who present oblations in which the late owner participates, the *Sakulyas* or remote kinsmen take the inheritance.†

Vide Precedents, pages 271, 275.

Authority. Manu:—Then the distant kinsman shall be the heir, or the spiritual preceptor, or the pupil.†—Chap. IX, *v.* 187.

The *Sakulyas* or distant kinsmen defined. Boudháyana says,—"The paternal great-grandfather and grandfather, the father, the man himself, his brothers of the whole blood, his son by a woman of the same tribe, his son's son and his great-grandson: all these partaking of undivided oblations, are pronounced '*sapindas*.' Those who share divided oblations are called '*Sakulyas*.' "Male issue of the body being left, the property must go to them. On failure of *sapindas*, or near kindred, *Sakulyas*, or remote kinsmen, are heirs. If there be none, the preceptor, the pupil, or the priest, will take the inheritance. In default of all these, the king has the escheat."—*Dá. Bhá.*, Chap. XI, Sect. i, para. 37.

Explanation of the above. The meaning of this passage is:—Since the fourth person (or the proprietor) enjoys the oblation-cakes presented to the father and the two next ancestors, as being the participator in the offerings at obsequies: and since the son and other descendants, to the number of three, present oblations to the deceased; and he, who, while living, presents an oblation to an ancestor, partakes, when deceased, of oblations presented to the same person; therefore, such being the case, the middlemost (of seven) who, while living, offered food to the *manes* of ancestors, and when dead, partook of the offerings made to them, became the object to which the oblations of his descendants were addressed in their lifetime, and shares with them, when they are deceased, the food which must be offered by the daughter's son, and other (surviving descendants beyond the third degree). Hence those (ancestors,) to whom he

* *Dá. Kra. Sang.*, Chap. I, Sect. x, § 20.—See Elb. In., p. 80, and *ante*, pp. 86—89, 92, 93.

† *Dá. Kra. Sang.*, Chap. I, Sect. x, § 21;—*Dá. Bhá.*, Chap. XI, Sect. vi, paras. 14, 21;—*Coleb.* Dig., Vol. III, p. 530; *Dá. Ta.*, Chap. XI, § 7. See *ante*, pages 86—89, 92, 93.

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presented oblations, and those (descendants,) who present oblations to him, partake of an undivided offering in the form of *(pinda)* food at obsequies. Persons, who do partake of such offerings, are *sapindas*. But one distant in the fifth degree, neither gives an oblation to the fifth in ascent nor shares the offering presented to his *manes*. So the fifth in descent neither gives oblations to the middle person who is distant from him in the fifth degree, nor partakes of the offerings made to him. Therefore three ancestors, from the grandfather's grandfather upwards, and three descendants from the grandson's grandson downwards, are denominated "*Sakulyas*," as partaking of divided oblations, since they do not participate in the same offering. This relation of *sapindas*, as well as that of *sakulyas*, has been propounded relatively to inheritance.—*Dá. Bhá.*, Chap. XI, Sect. i, § 37, 38.

Remark.

The fourth person and the (two) rest share the *lepa* or the remains of the oblations wiped off with *kusha* grass; the father and the (two) rest share the oblation-cakes; the seventh person is the giver of oblations; the relation of *Sapinda*, or men connected by the oblation-cake, extends, therefore, to the seventh person (or sixth degree of ascent or descent). It should, however, be noticed that these are considered *sapindas* only in the case of impurity by reason of a kinsman's death; but in respect of inheritance, (the first) three are as *sapindas*, (the other) three as *Sakulyas*.—See *Coleb.* Dig., Vol. III, p. 531.

The *Sakulyas*, or remote kindred, are of two descriptions, 1st, descending, and 2nd, ascending.*

The first includes the great-grandson's son and the rest down to the third degree in the descending line. The second intends the great-great-grandfather, and other ancestors up to the third degree in the ascending line.*

Vyavasthá.

118. Of the *sakulyas*, the son of the great-grandson is first entitled to succeed.*

Reason and Authority.

Because, he offers the remains of the oblations to the late proprietor, his father, and to his grandfather.*

Vyavasthá.

119. Next the grandson of the great-grandson.*

Because, he offers the remains of oblations to the late proprietor, and to his father.*

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* See *Dá. Kra. Sang.*, Chap. I, Sect. x. § 22, 23, 24;—*Dá. Bhá.*, Chap. XI, Sect. vi, § 22. See *ante* pages 89, 92, 93.

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Vyavasthá. **120. After him, the great-grandson of the great-grandson succeeds.***

Reason. Because he offers the remains of oblations to the late proprietor.

Authority. In the first place, the son of the great-grandson is heir, because he offers the remains of oblations to the (late) proprietor, to his father, and to his grandfather. Next the grandson of the great-grandson, and after him, the great-grandson of the great-grandson in the male line.—*Coleb.* Dig., Vol. III, p. 531.

Vyavasthá. **121. In default of the *sakulyas* as above, those in the ascending line inherit according to their respective order of proximity.***

Authority. Here the distant kinsmen in the descending line first obtain the inheritance, according to their respective order, since the deceased owner partakes of the remainder of the oblations which they present. In their default, the distant kindred, as far as the third degree in the ascending line, inherit in due order: since the deceased proprietor participates in the remainder of funeral oblations made to his great-great-grandfather, and other ancestors, three in all.—*Dá. Kra. Sang.*, Chap. I, Sect. x, § 24, 25.

Remark. JÍMÚTA-VÁHANA says,—"The distant kinsman *(sakulya)* is one who shares a divided oblation, as the grandson's grandson or other descendants within three degrees reckoned from him; or as the offspring of the grandfather or other remoter ancestor. Among these claimants (whether ascending or descending,†) the grandson's grandson and the rest are the nearest, since they confer benefits by means of the residue of the oblations which they offer. [These descendants are therefore heirs.†] On failure of such, the offspring of the paternal grandfather's grandfather inherits in right of the oblations presented to the paternal grandfather's grandfather and other ancestors who are sharers of the residue of oblations which the deceased was bound to offer." (*Dá. Bhá.*, Chap. XI, Sect. vi, § 21, 22.) But see the remark at page 90.

Vyavasthá. **122. The offspring of the above *sakulyas* also inherit in the order of proximity.‡**

Authority. Their offspring also(*a*): since they present oblations to the great-great-grandfather and the rest who are partakers of the remainder of the oblations which it belonged to the deceased owner to make.§—*Dá. Kra. Sang.* Sans., p. 11.

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* See *Dá. Kra. Sang.*, Chap. I, Sect. X, § 24, 25; *Coleb.* Dig., Vol. III, pp. 530, 531; see also *ante*, pages 87, 89, 92, 93. † SRÍ-KRISHNA.

‡ See *ante*, page 89.

§ Mr. Wynche's translation of the original of the above phrase is defective, as will be known by comparing the same with the original.

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(*a*) "Their offspring also." From this declaration of SRÍ-KRISHNA what can be understood and concluded is, that the paternal great-great-grandfather and the two next ancestors, and those of their issue who offer the oblation-cakes (and not the remains of oblations) succeed in the order of proximity. And their succession in such order can be as follows:—first, the paternal great-great-grandfather; failing him, his son, grandson, great-grandson, and daughter's son; in their default, the paternal great-grandfather's grandfather, his (the latter's) son, grandson, great-grandson, and daughter's son; on failure of these, the paternal great-great-grandfather's grandfather, his son, grandson, great-grandson and daughter's son inherit in the consecutive order. Remark.

JAGAN-NÁTHA, however, in violation of the above order, inserts the *Sakulyas* or remote kindred of the paternal great-great-grandfather and the rest *before* or *in preference to* his father and grandfather who are his *sapindas* or nearer of kin. Thus:—"On failure of these (*i. e.*, great-grandson's son, and the rest,) the paternal grandfather's paternal grandfather; if he be dead, his son and other descendants to the third degree have successive claims; on failure of these, the daughter's son of the paternal grandfather's paternal grandfather, and other givers of funeral cakes in the triple set of oblations, inherit in order; in default of them, the son, grandson, and great-grandson of the great-grandson of the grandfather's grandfather, in the male line, have successive claims as givers of the remains of funeral cakes to the paternal grandfather's paternal grandfather: on failure of them, the paternal great-grandfather's paternal grandfather is heir; if he be dead, his son, grandson, or great-grandson, in the male line, his daughter's son, the son of the great-grandson in the male line, and the son of that great-grandson's son, and the son of this last mentioned descendant, have successive claims as before; on failure of them, the paternal great-grandfather's paternal great-grandfather, his son, grandson and great-grandson, his daughter's son, the son, grandson, and great-grandson of this great-grandson similarly inherit in order." (*Vide Coleb.* Dig., Vol. III, p. 531.) But this is not consistent with the reason of the law:—1. Because the succession of the *Sakulyas* or distant kinsmen of the great-great-grandfather, who are related as *Samánodakas* to the deceased proprietor, is recognised *before*, or *in preference to*, the great-great-grandfather's father and grandfather, and their descendants to the third degree, all of whom are *Sakulyas* of the deceased proprietor, and 2. Because such order is repugnant to the two texts of MANU: "To three must libation of water be made; to three must oblation of food be presented," *&c.*; "To the nearest of kin the inheritance next belongs;"* and to the text of VRIHASPATI, cited in the following Further Remark.

* MANU, Chap. IX, *vs.* 186, 187.

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page, by reason of *Samánodakas* being preferred to *Sakulyas* who are related to the late proprietor more nearly than the former and, as such, should succeed before the *Samánodakas*, and also to the analogy of succession of the father and the rest, (ordained by SRÍ-KRISHNA and other authorities, as above shown) according to all of which, the father of the great-great-grandfather should succeed immediately after his (the latter's) daughter's son; then the great-great-grandfather's grandfather and his descendants, including daughter's son, should succeed in the order of proximity.

Vyavasthá. **123. Where there are many relatives, in the agnatic line (*jnátayah*), remote kindred (*sakulyáh*), and cognate kindred (*bándhaváh*), he of them, who is nearest of kin, shall take the property of him who dies without male issue (*b*).*—VRIHASPATI.**

Explanation. (*b*) Propinquity of kin must be considered with reference to the greater or less benefits conferred on the deceased proprietor, as is confirmed by both the texts (of MANU) already cited above.*

SECTION IX.

ON SUCCESSION OF SAMÁNODAKAS.

Vyavasthá. **124. If there be no such distant kindred, the *Samánodakas*, or kinsmen allied by common libations of water, inherit (*a*).†**

Vide Precedents, pages 271, 275.

Reason and Authority. Since they must be considered as comprehended in the term *Sakulya*.—*Dá. Kra. Sang.*, Chap. I, Sect. xi, § 26.

Authority. If there be no such distant kindred, the *Samánodakas* (*a*), or kinsmen allied by a common libation of water, must be admitted to inherit, as being signified by the term *Sakulya* (conformably with BOUDHÁYANA'S explanation of it.‡ *Ante* p. 116).—*Dá. Bhá.*, Chap. XI, Sect. vi, § 23.

Authority. Men connected by equal oblations of water are allied by family; and on failure of such kinsmen (as partake of the remains of funeral cakes), those who are connected by equal oblations of water are heirs, as suggested by the term "kinsmen allied by family;" for it is so remarked by JÍMÚTAVÁHANA. Such is the succession of kinsmen.—*Coleb.* Dig., Vol. III, page 533.

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* *Dá. Kra. Sang.*, Chap. I, Sect. x, § 25;—*Coleb.* Dig., Vol. III, p. 532.

† *Dá. Bhá.*, Chap. XI, Sect. vi, § 23;—See *Coleb.* Dig., Vol. III, pages 530—532.

‡ ACHYUTA.

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(*a*) The relation of *Samánodakas* extends to the fourteenth person, in conformity with the text of *Vrihat* MANU: "But the relation of *Samánodakas*, or those connected by an equal libation of water, ceases with the fourteenth person;"* or "as some affirm, it reaches as far as the memory of birth and name extends. This is signified by *gotra* or the relation of family name."† Explanation.

125. The *Samánodakas* also should, like *Sakulyas*, succeed in the order of proximity*(b)*. *Vyavasthá.*

(*b*) That is, by parity of reason, the *Samánodakas* in the descending line should succeed first, and then those in the ascending line, in the due order of proximity, conformably with the maxim,—"the sense of the law, as ascertained in one instance, is applicable in others also, provided there be no impediment."‡ Explanation.

JAGAN-NÁTHA says:—"Among these, the eighth ancestor, his son, grandson, great-grandson, and daughter's son, and the rest, as far as the fourteenth in descent, counted from the eighth ancestor, successively claim the inheritance: the same must be understood in the ancestor and the rest; for nearness of kin and superior benefits are entitled to be respected in every case." (*Coleb.* Dig., Vol. III, p. 533.) The remark made, in the two last pages, on the order of *Sakulyas* given by him, applies also to the above. Remark.

SECTION X.

ON SUCCESSION OF THE SPIRITUAL PRECEPTOR AND THE REST.

126. On failure of the *Samánodakas*, the *Áchárryya*, or spiritual preceptor (*a*) is the successor.§ *Vyavasthá.*

Vide Precedents, pages 296, 297.

127. In default of him, the pupil inherits.*(b)*§ *Vyavasthá.*

On failure of these (*i. e.*, the *Samánodakas*), the spiritual preceptor is the successor.(*a*) In default of him, the pupil is heir, for the text of MANU, "the spiritual preceptor, or pupil,"

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* *Coleb.* Dig., Vol. III, p. 532.

† The first part of this passage occurs in Manu's Institutes, 5. 60. The remainder of the text differs. See *Mit.* In., Chap. II, Sect. v, § 6.

‡ See *Dá. Bhá.*, Chap. III, Sect. ii, § 31, annotation;—*Coleb.* Dig., Vol. III, pp. 18, 19, 99, 106, and Precedents, p. 203.

§ *Dá. Bhá.*, Chap. XI, Sect. vi, § 24.—*Dá. Kra. Sang.*, Chap. I, Sect. x, paras. 27, 28.—*Coleb.* Dig., Vol. III, p. 533. See Elb. In., p. 80, and *ante*, p. 90.

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propounds the order, in which these persons shall respectively succeed.—*Dá. Kra. Sang.*, Chap. I, Sect. x, § 28.

(*a*) The spiritual preceptor is he who instructs (his pupil) in the *Veda*, after investing (him) with the holy thread, whence is he denominated '*A'chárryya.*'—*Dá. Kra. Sang.*, Chap. I, Sect. x, para. 28. See *Coleb.* Dig., Vol. III, pp. 533, 534.

(*b*) A pupil is he who receives instruction in the *Veda*. *A'chárryya* is he who gives such instruction.—SRÍ-KRISHNA'S commentary on the *Dáya-bhága*, Sans., p. 238.—*Vide Coleb.* Dig., Vol. III, p. 534.

Vyavasthá. **128.** On failure of him, the fellow-student (*c*) of the *Vedas* is heir.*

Authority. On failure of him a fellow-student of the *Vedas*, as named in the text of YÁJNAVALKYA: "A pupil and fellow-student," &c., (*ante*, page 29).—*Dá. Kra. Sang.*, Chap. I, Sect. x, § 29.

(*c*) A fellow-student is he who studies the *Veda* under the same preceptor.—See *Coleb.* Dig., Vol. III, p. 534.

Authority. On failure of these (*i.e.*, the *Samánodakas*), the spiritual preceptor (or instructor in knowledge of the *Veda*) is the successor. In default of him, the pupil (or student of the *Veda*) is heir: by the text of MANU, "or the spiritual preceptor or the pupil."† On failure of him likewise, the fellow-student; by the text, (of YÁJNAVALKYA) "a pupil and a fellow-student." (*Ante*, page 29.)—*Dá. Bhá.*, Chap. XI, Sect. vi, § 24.

Vyavasthá. **129.** In his default, the descendants of the same ancient sage, being inhabitants of the same village, succeed.*

Vyavasthá. **130.** On failure of them, men who are descended from the same patriarch and inhabit the same village, are the successors.*

Authority. In his default, persons bearing the same family-name, being inhabitants of the same village, succeed.—*Dá. Kra. Sang.*, Chap. I, Sect. x, § 30.

Authority. On failure of them, persons, inhabitants of the same village, and descended from the same patriarch, are the successors, according to the text of GOUTAMA: "Persons allied by the

* *Dá. Kra. Sang.*, pp. 29—31;—*Dá. Bhá.*, Chap. XI, Sect. vi, § 24, 25;—*Coleb.* Dig., Vol. III, pp. 533—536. See Elb. In., p. 80, and *ante*, pp. 87, 90.

† MANU, Chap. IX, v. 137.

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funeral oblations, family-name, and patriarchal descent, shall take the heritage."*—*Dá. Kra. Sang.*, Chap. I, Sect. x, § 31.

In default of these claimants, persons bearing the same family-name (*gotra*) are heirs: on failure of them, persons descended from the same patriarch are the successors. For the text of GOUTAMA expresses "Persons allied by funeral oblations, family-name, and patriarchal descent, shall share the heritage (of a childless man; or his widow shall partake).*—*Dá. Bhá.*, Chap. XI, Sect. vi, § 25. Authority.

131. On failure of all of the foregoing heirs, the *Bráhmanas* of the same village, endowed with learning in the three *Vedas* and with other qualities, are the successors.† *Vyavasthá.*

On failure of all heirs as here specified, let the priests take the estate. Thus MANU says, "On failure of all those, the lawful heirs are such *Bráhmanas* as have read the three *Vedas*(*d*), as are pure in body and mind, as have subdued their passions: Thus virtue is not lost."(*e*)—*Dá. Bhá.*, Chap. XI, Sect. vi, § 26. See *Dá. Kra. Sang.*, Chap. I, Sect. x, § 32. Authority.

(*d*) "Have read the three *Vedas*,"—that is, have studied all the *Vedas*.—*Vide Coleb.* Dig., Vol. III, p. 536.

(*e*) Virtue, which would be extinguished by the ample enjoyment (of its reward), but is renewed by the acquisition of fresh merit from the circumstance of his wealth devolving on *Bráhmanas*, is not lost. Here also the author indicates the appropriation of the property for the benefit of the deceased.—*Dá. Bhá.*, Chap. XI, Sect. vi, § 26. Exposition.

132. In default of them, the property goes to the king, excepting, however, that of a *Bráhmana*.† *Vyavasthá.*

See, however, Precedents, pages 296, 297.

In default of them, the king shall take the wealth: excepting the property of a *Bráhmana*. Excepting the property of a *Bráhmana*, let the king take the wealth (on failure of heirs).—*Dá. Bhá.*, Chap. XI, Sect. vi, paras. 27, 34. Authority.

So MANU directs:—"The property of a *Bráhmana* shall never be taken (as an escheat) by the king: this is a fixed law: but the wealth of the other classes, on failure of all heirs (*f*), the king may take."—*Ibid.*, § 34. Authority.

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* GOUTAMA, Chap. 28, *v.* 19.

† *Dá. Kra. Sang.*, Chap. I, Sect. x, § 32, 33, 34;—*Dá. Bhá.*, Chap. XI, Sect. vi, § 26, 27.—See Elb. In., p. 80, and *ante*, pp. 90, 93, 96.

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(*f*) By the term "all," is signified every heir including the *Bráhmana*.*—*Ibid.*

Authority. BOUDHÁYANA:—Poison kills but one, a *Bráhmana's* property (unduly appropriated) kills (also) the son and son's son: therefore the king shall on no account take the property of a *Bráhmana*.†

Authority. DEVALA:—"In every case the king may take the property of a subject dying without an heir, except the estate of a *Bráhmana*; for the property of a *Bráhmana* dying without an heir must be given to learned priests."†

Authority. SANKHA and LIKHITA:—The property of a *parishad* (*g*) descends to *Bráhmanas*, not to the king; wealth consecrated to the gods, or allotted to priests, must not be seized by the sovereign, nor a deposit, open or sealed (*h*), nor wealth regularly inherited, nor the property of infants or women: thus the *Veda* expresses: "The inherited property of a woman must not be seized by the king, nor (acquired) effects of an infant, nor the wealth of a woman received in the six modes of acquisition, nor the patrimony of infants."†

Explanation. (*g*) The term "*parishad*," in the above text, signifies a *Bráhmana*.†

Explanation. (*h*) Deposits and the rest are terms employed indefinitely: hence the property consecrated to the gods, or allotted to the priests, must on no account be taken by the king, unless as a fine or the like.†

Remark. A failure of the descendants from the same patriarch and of persons bearing the same family-name, as well as of *Bráhmanas*, must be understood as occurring when there is none inhabiting the same village, else an escheat to the king could never happen.—*Dá. Bhá.*, Chap. XI, Sect. vi, para 27.

Vyavasthá. **133.** Failing the duly qualified *Bráhmana*, in respect to the property of a *Bráhmana*, a *Bráhmana* of another village is the successor(*i*), but not the king.—*Dá. Kra. Sang.*, Chap. I, Sect. x, § 34.

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* The term 'all' intends as far as *Bráhmanas*. That is, on failure of all (heirs) including honest or good *Bráhmanas*. Vide *Coleb.* Dig., Vol. III, page 537.

† *Coleb.* Dig., Vol. III, pp. 537—539.

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(i) From the expression "a *Bráhmana* of another village" it is deduced that—

134. In default of a virtuous *Bráhmana* of the same village, a like *Bráhmana* of another village should take the property of a *Bráhmana*. *Vyavasthá.*

And not a common *Bráhmana* of the same village so long as a virtuous *Bráhmana* can be found.

Because, according to the texts: "*Bráhmanas* as have read the three *Vedas*, as are pure in body and mind, as have subdued their passions: Thus virtue is not lost," &c.,* and "wealth is ordained for sacrifices; therefore distribute it among good men, not among women, ignorant men, and such as neglect their religious duties,"†—a virtuous *Bráhmana* is preferable to an ignorant one. Reason and Authority.

135. On failure of a virtuous *Bráhmana*, the property of a *Bráhmana* should be given even to a common *Bráhmana*.‡ *Vyavasthá.*

Inasmuch as the property of a *Bráhmana* must never be taken by the king. Reason.

136. The common *Bráhmana* of the same village should, however, succeed first. In his default, a like *Bráhmana* of another village.‡ *Vyavasthá.*

Since an inhabitant of the same village is to be preferred to the inhabitant of a different village.‡

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* *Ante*, page 109.

† Mit. In., Chap. II, Sect. i, § 14. *Coleb.* Dig., Vol. III, p. 484.

‡ See *Coleb.* Dig., Vol. III, pp. 537—539.

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CHAPTER IV.

ON SUCCESSION TO THE PROPERTY OF THOSE WHO, HAVING QUITTED THE HOUSEHOLD ORDER, ENTERED INTO ANOTHER.

SECTION I.

ON SUCCESSION TO THE PROPERTY OF A HERMIT, ASCETIC, AND STUDENT IN THEOLOGY.

Vyavasthá. **137.** The preceptor (*áchárryya*) takes the property of a professed student in theology.*

Vyavasthá. **138.** The virtuous pupil inherits the property of an ascetic (*Yati*).*

Vyavasthá. **139.** The spiritual brother, that is, he who is engaged in the same pilgrimage or sojourns in the same hermitage, takes the property of a hermit.*

Vyavasthá. **140.** On failure of the above, the associate in holiness, or the person belonging to the same order, inherits.*

Authority. The goods(*a*)† of a hermit, of an ascetic, and of a professed student, let the spiritual brother, the virtuous pupil, and the holy preceptor, take.—*Dá. Bhá.*, Chap. XI, Sect. vi, § 35.

Authority. The goods of an anchorite, an ascetic, and professed student, are taken by the spiritual brother, the virtuous pupil, and the holy preceptor. On failure of these, the associate in holiness, or person belonging to the same order, inherits.—*Dá. Kra. Sang.*, Chap. I, Sect. x, § 35, 36.

Authority. Thus YÁJNAVALKYA says, "The heirs of a hermit, of an ascetic, and of a student(*c*) in theology are, in their order(*b*), the preceptor, the virtuous pupil(*d*), and the spiritual brother and associate in holiness.(*e*)"—Chap. II, *v.* 138.

Explanation. (*a*) Goods, such as they may happen to possess,† should be delivered in the inverse order of this enumeration.—*Dá. Bhá.*, Chap. XI, Sect. vi, § 36.

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* *Dá. Bhá.*, Chap. XI, Sect. vi, § 35;—*Dá. Kra. Sang.*, Chap. I, Sect. x, paras. 35, 36.

† Goods, such as they may happen to possess, *viz.*, the hoard of wild rice or other property of a hermit; the gourd, clout and other effects of an ascetic, and the books, clothes and other goods of a student.—*Dá. Bhá.*, Chap. XI, Sect. vi, § 36, annotation.

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(b) "Order," that is, the inverse order. Therefore, the preceptor takes the goods of the professed student, the virtuous pupil, those of the ascetic, and the spiritual brother and associate in holiness, that is, he who is engaged in the same pilgrimage or sojourns in the same hermitage, those of the anchorite.—*Dá. Kra. Sang.*, Chap. I, Sect. x, § 36. Explanation.

(c) The student must be understood to be a professed one: for abandoning his father and relations, he makes a vow of service and of dwelling for life in his preceptor's family.—*Dá. Bhá.*, Chap. XI, Sect. vi, § 36. Explanation.

(c) The student in theology is of two descriptions: perpetual (*noishthika*) and temporary (*upa-kurbána*). The preceptor inherits the goods possessed by a perpetual student.—*Dá. Kra. Sang.*, Chap. I, Sect. x, § 37. Exposition.

(d) A virtuous pupil takes the property of a *Yati* or ascetic. A virtuous pupil (*Sat-shishya*) again, is he who is assiduous to the study of theology, in retaining the holy science, and in practising its ordinances. For a person, whose conduct is bad, is unworthy of the inheritance, were he even the preceptor or (standing in) any other (venerable) relation.—*Mit.* Inh., Chap. II, Sect. viii, § 5. Explanation.

(e) A spiritual brother and associate in holiness takes the goods of a hermit (*Vánaprastha*). A spiritual brother is one who is engaged as a brotherly companion (having consented to become so). An associate in holiness is one appertaining to the same hermitage. Being spiritual, and belonging to the same hermitage, he is a spiritual brother associate in holiness.—*Mit.* Inh., Chap. II, Sect. viii, § 5. Explanation.

(e) '*A spiritual brother*' is one who has the same preceptor. '*An associate in holiness*' is one who has studied the same *shástra*.—*Smri. Chan.*, Chap. XI, Sect. vii, cl. 2. Explanation.

141. The property of a temporary student is inherited by his father and other heirs. *Vyavasthá.*

But the property of a temporary student would be inherited by his father and other relations.—*Dá. Bhá.*, Chap. XI, Sect. vi, § 36. Authority.

But the property of a temporary student would be inherited by his father and relations, since he does not enter on any such vow, and merely attends his preceptor for the purpose of instruction.—*Dá. Kra. Sang.*, Chap. I, Sect. x, para. 37. Authority.

Are not those, who have entered into a religious profession, unconcerned with hereditable property? Since VASHISHTHA declares, "They, who have entered into another order, Remark.

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are debarred from shares." How then can there be a partition of their property? Nor has a professed student a right to his own acquired wealth: for the acceptance of presents, and other means of acquisition, [as officiating at sacrifices and so forth,] are forbidden to him. And since GOUTAMA ordains, that "A mendicant shall have no hoard; the mendicant also can have no effects by himself acquired. The answer is, a hermit may have property: for the text [of YÁJNAVALKYA] expresses:—"The hermit may make a hoard of things sufficient for a day, a month, six months, or a year; and, in the month of *Áswina*, he should abandon [the residue of] what has been collected." The ascetic, too, has clothes, books, and other requisite articles: for a passage [of the *Veda*] directs, that "he should wear clothes to cover his privy parts;" and a text [of law] prescribes, that "he should take the requisites for his austerities, and his sandals." The professed student likewise has clothes to cover his body; and he possesses also other effects.—*Mit.* Inh., Chap. II, Sect. viii, § 7, 8.

SECTION II.

ON SUCCESSION TO MAHANTS AND THE LIKE.

It has already been said that the property of a *yati* (ascetic) is inherited by his virtuous pupil (*ante*, p. 112). In imitation of the same,—

Vyavasthá. **142.** *Mahants, Boirágís,* and other like devotees, who are considered to be corrupt *Yatis** are, on their death, succeeded in their rights and possessions by their virtuous pupils or principal *chelás,* subject, however, to the usage or custom of the particular *maths* or monasteries of each sect.

Vide Precedents, pages 298—311, 313—321.

Annotations.

142. Of such successions, an instance will be found in the appendix, and several in the Bengal Reports, referable to the religious order of *Sanyásís* or *Gossáins,* who being restricted from marrying, and consequently precluded from leaving legitimate issue, are, on

* See Part i, pages 112, 113.

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Generally, the usage or custom of *Mahants* is, that the *Mahant* or principal of every *math* or monastery selects his principal and most worthy pupil to succeed to him at his decease; that after his death, the *Mahants* of other similar institutes in the vicinage convene an assembly of the order and perform his *Bhándárá*, or funeral obsequies, at which they generally confirm the nomination made by the deceased, and install the pupil, he selected, as his authorized successor; that if the *Mahant* for the time being does not find any of his pupils worthy of the office, he selects some one from any other *math* of the order and appoints him his successor, and his appointment is confirmed by the *Mahants* convened at the *Bhándárá*; but where a *Mahant* died without appointing a successor, there his successsor is selected generally from amongst his pupils by the *Mahants* convened at his *Bhándárá*, and invested with the Mahantship of the *math*; that if the person nominated by the late *Mahant* be found by them to be unworthy of the office, then they (the convened *Mahants*) elect a fit person and appoint him successor of the late *Mahant*. In short, the installation of the successor by an assembly of *Mahants* at the obsequies of the deceased *Mahant* is in all cases indispensable and conclusive; and, consequently, the appointment of a successor by the late *Mahant* is not final so long as it is not confirmed by the *Mahants* convened at the *Bhándárá*.* Remark.

In some countries, especially in Urissa, there are three kinds of *Maths* or monasteries, namely, "*Mourúsí*, *Pancháyetí*, and *Hákimí*." In the first, the office of *Mahant* is hereditary, and devolves upon the chief disciple of the existing *Mahant*, who moreover usually nominates him as his successor; in the second, the office is elective, the presiding *Mahant* being selected by an assembly of *Mahants*; Remark.

Annotations.

their death, succeeded in their rights and possessions by their *chelás*, or adopted pupils. It may be added here, that lands endowed for religious purposes are not inheritable at all as private property, though the management of them, for their appropriate object, passes by inheritance, subject to usage; as in the case of many of the religious establishments in Bengal, where the superintendence is, by custom, on the death of the incumbent, elective by the neighbouring *Mahants*, or principals of other similar ones.—Stra. H. L., Vol. I, pages 150, 151.

* *Vide* Precedents, pp. 542—557.

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and in the third, the appointment of the presiding *Mahant* is vested in the ruling power, or in the party who endowed the temple.*

Vyavasthá. **143.** But the property acquired by the (so-called) ascetics who have not *bonâ fide* retired from all worldly affairs, devolves on their former heirs (*viz.*, sons and the rest).

Vide Precedents, pages 312, 313.

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* *Vide* Precedents, pages 298—311.

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CHAPTER V.

ON CUSTOM OR USAGE, &c.

SECTION I.

On Succession by Usage or Custom.

Although succession to inheritance among householders (*grihasthas*) is regulated by the principles or rules contained in the second and third chapters, yet,—

144. If a custom or usage has obtained in a country, district, village, nation, tribe, class, or family, and has been *invariably* observed from time immemorial, or for many generations,* it supersedes the general maxims or rules of the law. *Vyavasthá.*

Vide Precedents, pages 322—333.

So, according as the custom may be, the eldest son may take the entire estate, or the sons may deduct in the first place unequal portions, (as the eldest one twentieth, the middlemost one-fortieth, and so on), and then divide the residue equally,† or they may divide the estate according to the number of their mothers, without reference to the number of the sons borne by each (a distribution technically termed "*patnítah vi-bhága*"); ‡ or the eldest, or another brother, qualified, may singly take the landed estate,§ according as there may be the immemorial *kulá-chár* or family-custom. Remark.

Annotations.

144. Usage being a branch of the Hindú law, which, wherever it obtains, supersedes the general maxims of the law.—Stra. H. L., Vol. I, p. 251.

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* Although in this country we cannot go back to that period, which constitutes legal memory in England, *viz.*, the reign of Richard I, yet still there must be some limitation, without which a custom ought not to be held good. In regard to Calcutta, I should say that the Act of Parliament in 1773, which established this Supreme Court, is the period to which we must go back to find the existence of a valid custom, and that after that date, there can be no subsequent custom, nor any change made in the general laws of the Hindús, unless it be by some Regulations by the Governor-General in Council, which has been duly registered in this Court. In regard to the Mofussil, we ought to go back to 1793, prior to that, there was no registry of the Regulations, and the relics of them are extremely loose and uncertain.—Extract from a judgment of Sir Charles Grey, C. J. See Clarke's Reports, pages 113, 114.

† See Partition, and the Precedents, pp. 323—333.

‡ See Partition, and Precedents, pp. 335, 336.

§ See Partition, and Precedents, pp. 335, 336.

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Authority. KÁTYÁYANA :—BHRIGU (says) : "Whatever be the usage of a country, tribe, or nation, body of people, or village, let that be followed, and let partition of heritage be made in conformity thereto."—*Dáya-tattwa* (Sans.), p. 7. See *Coleb.* Dig., Vol. III, p. 376.

Authority. MANU :—Immemorial custom is transcendent law, approved in the sacred scripture and in the codes of divine legislators: let every man, therefore, of the three principal classes, who has a due reverence for the (*supreme*) spirit (*which dwells in him*), diligently and constantly observe immemorial custom.—Chap. I, *v.* 138.

Authority. SAMVARTA :—Whatever custom has, in a country, come down from generation to generation, the same is transcendent law, provided it be not repugnant to the (ordinances of the) *Vedas.—Samvarta-sanhitá.*

Authority. MANU :—The king who knows the revealed law, must inquire into the *dharmas* (*a*) of classes, the *dharmas* of districts, the *dharmas* of traders and the like, and the *dharmas* of families, and shall establish their peculiar *dharmas.*—Chap. VIII, *v.* 41.

The king who knows the revealed law, shall know the long continued practices of *Bráhmanas* and other classes, that is, *jájana*, &c.; the established and continuously observed usages of a country; the rules of traders and the like, and the custom established in a family and continuously observed by it, and shall establish them in civil matters, provided they be not repugnant to the *Vedas*; for GOUTAMA says:—"The *dharma* (*a*) of a country, class, or family, should be respected when it is not repugnant to the *Vedas.*"—KULLÚKA BHATTA'S Commentary on the above text of MANU.

Interpretation (*a*) By the word "*Dharma*" is here meant practice, usage, custom, or rule. But,—

Vyavasthá. **145.** The custom or usage which has not been *invariably* observed from time immemorial, or for many generations, is not to be held as superseding the maxims of the law.

Vide Precedents, pages 333—337.

Vyavasthá. **146.** The prevention of enforcement of a custom or usage by violence or undue means should not, however, be held to be a breach thereof or a break in its observance.

Vide Precedents, p. 335.

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147. Where no express law is found, one should be established on approved usage or practice of good and great men. *Vyavasthá.*

MANU :—The scripture, the codes of law, approved usage, and (in all indifferent cases), self-satisfaction, the wise have openly declared to be the quadruple description of the juridical system. Know that system of duties which is revered by such as are learned in the *Vedas*, and impressed (as the means of attaining beatitude) on the hearts of the just, who are ever exempt from hatred and inordinate affection. Chap. II, *v.* 1 and 12. Authority.

MANU :—What has been practised by good men and by virtuous *Bráhmanas*, if it be not inconsistent with the legal customs of provinces or districts, of classes and families, let him (the king) establish it.—Chap. VIII, *v.* 46. Authority.

VASHISHTHA :—An act is legal where it is sanctioned by scripture and law : in their absence, the usage of the great is the authority.*

Mahá-bhárata :—The *Vedas* are different, (*i. e.*, vary from each other,) so are the *Smritis* or codes of law ; he is not a *Muni* or *Sage* whose doctrine is not different (from that of others) ; the principle of virtue remains hidden in the cave : the career of great men is *the* (*only*) *path.* Authority.

Skanda Purána :—In respect of any matter, if there is no direct ordinance or prohibition in the *Vedas* or in the codes of law, the law is to be ascertained by reference to the usage of the country and family. Authority.

NÁRADA :—Where two texts of law differ from one another, there the rule founded on usage is recognized (to be the law). Usage alone is prevalent, and the law is thereby ascertained. Authority.

The use of law is only to prevent multiform practices at the will of the men of the present generation. Where many texts of law are inconsistent, or many interpretations of the same text are contradictory, usage alone can be received as a rule (of conduct). But where no (positive) ordinance is found, and there is nothing inconsistent with any known law, in that case approved usage alone must regulate the proceedings. Still, however, the example of learned and virtuous *Bráhmanas* should be followed.—*Coleb.* Dig., Vol. I, (Cal. Ed.) p. 96. Authority.

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* Cited in the *Smriti-chandriká*, Chap. III, Cl. 21.

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Vyavasthá. **148.** The usage or practice of a country, &c., which has its origin in the general agreement of the people, and is not repugnant to the *Vedas* or the codes of law *(Smriti)*, should also be respected and observed.

Authority. YÁJNAVALKYA:—The usage or practice which has its origin in the general agreement of the people should be carefully preserved or observed, as also that which is established by a king; provided such usage or practice be not opposed to one's own *dharma* (*a*).

Vyavasthá. **149.** The succession to *a ráj* or principality appears to have been regulated by custom prevalent from time immemorial: the eldest succeeds to the entire *ráj* unless he be unfit, when the next qualified brother would succeed.

Vide Precedents, pages 323—331.

Authority. This is manifest from the words of VÁLMÍKI put in the mouth of *Mantharú* when addressing (queen) *Koikeyí* "Charming (queen)! it is not that all the sons of a king enjoy the kingdom: one amongst many sons is consecrated to the *ráj*, for if all the sons be in (possession of) the *ráj*, great disorder shall ensue; therefore, spotless beauty! kings commit the affairs of their kingdoms (respectively) to their eldest or some other well-qualified sons, which eldest sons (respectively) deliver their kingdoms entire to their own sons, doubtless to the eldest (sons), not to their own brethren. Thus your son shall not have much reverence, but as a helpless one, shall be destitute of enjoyment, nor shall he

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Annotations.

149. Where a plurality of sons exists, the inheritance descends to them, as *co-parceners*, making together but one heir; like the descent with us, by the common law, to females, or by particular custom, as *gavelkind*, to all the males in equal degree. To this descendibility of estates, by Hindú law, to all the sons in common, there appears to have been ever, in point of fact, an exception in the case of the Crown; as it is with us, at this day, in the same case, where there are only females to inherit. The exception, arising from the nature of the thing, is noticed by MANU, who speaks of a dying king "having duly committed his kingdom to his son;" a course which Jagan-nátha refers to usage rather than to law.—Stra. H. L., Vol. I, p. 198.

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be longer reckoned a member of the ever-enduring royal race."—*Rámáyana, Ayodhyá Kánda.*

"But of many sons, one is consecrated to the empire. If all were kings, it would be the highest injury. Therefore, spotless beauty! kings commit the affairs of government to their eldest sons, or to others more virtuous. Doubtless they consecrate to the empire the eldest *by birth or excellence,* and never commit the entire kingdom to his brothers." After commenting on these texts the author of the *Vivádá-bhangárnava* puts this question, "May not the middlemost, or other son, be inaugurated?" and himself decides it thus:—"Since the eldest son, being first, cannot be passed over, his consecration is directed; but if he be vicious, another son, who is virtuous, may obtain the kingdom."—*Vide Coleb.* Dig., Vol. II, p. 123. Remark.

"Among all the sons of *Ikshwáku,* the first-born is king: thou, son of *Raghu,* art first born, and shalt this day be consecrated to the empire. This prescriptive law in thy family thou canst not now reject."—*Rámáyana, Ayodhyá Kánda.—Ibid.,* p. 119. Authority.

When *Pándu* retired to the forest, his kingdom, governed by *Dhrita-ráshtra,* fell under the domination of *Duryodhana;* but recovered by *Bhíma* and his brothers, was enjoyed by *Yudhishthira,* and not shared by his brethren. Therefore, a kingdom is indivisible.—*Ibid.,* p. 120. Example.

Even now it is seen in practice, that entire kingdoms are severally held by one prince, although he have brothers. *Ibid.,* p. 119.

In imitation of the above,—

150. Succession to great and ancient landed estates, though not independent but revenue-paying, is also regulated by custom: the eldest, or in case of his being unfit, the next qualified brother, would succeed to the whole. *Vyavasthá.*

Vide Precedents, pages 328—333, 337—340.

Annotations.

150. Upon the same principle of usage, stands, with respect to many of the great *zemindaries* of Bengal and other parts of India, at this day, the exclusive succession of the eldest son, or of a *juba-rájj* (*Yuva-rája,* Juvenis rex), a young prince, associated to

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Vyavasthá. **151.** If a king give the whole of his dominions to his eldest son qualified for the empire, although his other sons be void of offence, the gift is valid, provided it be the act of a prince neither insane nor otherwise disqualified; for it is done in conformity with the practice of former kings (as shown in sacred and popular histories) without offence on the part of the sons or of their father. *Coleb.* Dig., Vol. II, p. 118.

Vide Precedents, pages 329, 337—340.

Example. Thus *Dasha-ratha* intended to commit his kingdom to *Ráma,* in the presence of VASHISHTHA and many other sages, and in the presence of the citizens *at large,* although *Bharata* and his other sons were faultless; but afterwards excluding *Ráma* and the rest, he gave his kingdom to *Bharata,* as a boon to *Koikeyí.*—*Ibid.*

Annotations.

the Empire, as coadjutor to the king, and his designated representative.—Stra. H. L., Vol. I, p. 198.

In the succession to principalities and large landed possessions, long established *Kulāchára* will have the effect of law, and convey the property to one son to the exclusion of the rest. It has been stated by Mr. Colebrooke, in a note to the Digest (Vol. II, p. 119,) that the great possessions, called *zemindaries* in official language, are considered by modern Hindú lawyers as tributary principalities. Macn. H. L., Vol I, p. 18.

This custom, by which the succession to landed estates invariably devolves on a single heir, without a division of the property, has been recognized and declared legal by Regulation 10 of 1800. A formal enactment was not perhaps necessary as far as the Hindú law is concerned, *that* law itself providing for exception to its general rules, and declaring that particular customs shall supersede the general laws.—Note by Macnaghten cited as an authority in the case of *Mahá-Rájkumār Vásdeo Sing* versus *Mahā-Rájá Rudra Singh Báhádur.*—Sel. S. D. A. Rep., Vol. VII, (New Ed.) p. 301.

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CHAPTER VI.

ON CHARGES ON THE INHERITANCE.

The charges to which the inheritance is liable, are of three kinds. First,—discharge of debts and other obligations. Secondly,—the performance of the obsequies, &c., of the late proprietor, and the initiation of his children. Thirdly,—maintenance of such persons whom the deceased proprietor was bound to support and who are entitled to have maintenance from his estate or successor. Those who take the heritage must discharge these duties.

SECTION I.

On Payment of Debts, &c.

152. A partition should be made by sons of the wealth of their deceased father, which may remain after discharging his debts.* *Vyavasthá.*

Vide Precedents, pages 342, 344, 447, 453, 454.

Nárada :—What remains of the paternal inheritance (*a*) over and above the father's obligations and after payment of his debts, may be divided by the brethren; so that their father continue not a debtor(*b*).† Authority.

(a) Here the term paternal is merely illustrative: it in general indicates the heritage of a deceased proprietor.—See *ante* p. 6, post p. 124, and Precedents, p. 352. Consequently,—

153. When an heir takes the heritage of his paternal grandfather, uncle, or any one else, he must pay his debt. *Vyavasthá.*

Vide Precedents, pages 342—346, 348—350.

Annotations.

152, 153, 161. The most general position respecting it is, that debts follow the assets into whosesoever hands they come; the obligation to pay attaching, not upon the death only of the ancestor, but on his becoming an anchoret, or having been so long absent from home, as to let in a presumption of death.—Stra. H. L., Vol. I, page 166.

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* *Dá. Kra. Sang.*, Chap. VII, § 26.

† *Dá. Bhá.*, Chap. I, § 47;—*Dá. Kra. Sang.*, Chap. VII, § 27.

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Authority. YÁJNAVALKYA.—He who has received the estate of a proprietor leaving no son (competent to inherit) must pay (his) debts, or, on failure of him, the person who takes the wife (of the deceased); but not the son whose father's assets are held by another.—See *Coleb.* Dig., (Cal. Ed.), Vol. I, page 278.

Authority. VISHNU.—He, who takes the assets of a man leaving no male issue, must pay the sum due (by him).—*Ibid.*, p. 329.

Authority. NÁRADA:—A childless widow must pay the debt of her sister enjoining payment; or whoever receives the assets left by that sister, must pay her debts.—*Ibid.*, p. 323. See *Dá. Bhá.*, Chap. I, § 47.—*Dá. Ta.*, Chap. III, § 1.

Exposition. (*b*) It appears from the passage—"So that the father may not continue a debtor," that in case of inability (to liquidate the father's debts at the time of partition) it ought to be acknowledged before the creditors that the debts shall be paid off after partition.—*Dá. Ta.*, Chap. III, § 1. Consequently,—

Vyavasthá. **154. Co-heirs, making a partition, may apportion the debts of their father or other predecessor, with the consent of the creditors, or must immediately discharge the debts.**

Authority. From that text of NÁRADA,* it results that co-heirs, making a partition, may apportion the debts of their father or other predecessor, with the consent of the creditors, or must immediately discharge the debts. For such is the purpose of ordering a partition of the residue after payment of debts.—*Dá. Bhá.*, Chap. I, § 48.

Authority. NÁRADA:—A father being dead, his sons, whether after partition or before it, shall discharge his debt in proportion to their shares, or that son alone, who has taken the burthen upon himself.—See *Coleb.* Dig., (Cal. Ed.), Vol. I, page 275.

Annotations.

154. The course for the payment of debts, on partition, may be either by disposing of a sufficient part of the property for the purpose, and thus paying them off at once; or, by apportioning them among the parceners, according to their respective shares;—an arrangement, which, to be binding upon creditors, would require their assent.—Stra. H. L., Vol. I, pp. 168, 169.

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* Cited under *Vyavasthá* 152.

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For instance, if the debt of the father amount to a hundred *suvarnas*, (four brothers must severally declare,) "twenty-five *suvarnas* thereof constitute a debt due from me."—*Coleb.* Dig., Vol. III, p. 89. Illustration.

155. Of the mother's wealth too, only what remains over and above her debts is to be divided. *Vyavasthá.*

Vide Precedents, page 342.

YÁJNAVALKYA propounds the distribution of a mother's wealth remaining over and above her debts. "Daughters share the residue of their mother's property, after payment of her debts: and the male issue, in default of daughters."—*Dá. Bhá.*, Chap. I, § 48. Authority.

156. Even if sons and grandsons received no heritage from their father and grandfather, still it is their pious obligation to pay the debts of those ancestors,—with this difference, however, that the sons should pay the same with, and the grandsons without, interest; but the great-grandson, like the widow and other heirs of a debtor, should not pay his debts without taking his assets or inheriting his property. *Vyavasthá.*

Vide Precedents, pages 347, 348, 349, 352.—*Vide Vyav. Chan.*, Vol. I, Part ii, p. 624.

The meaning is that, if the great-grandson and the rest take the inheritance, then they must pay the debts (of the ancestor), and not otherwise; but it has been declared that the son and grandson are to be made to pay the debts even if they did not receive the inheritance.

Thus NÁRADA:—"An undisputed debt of the grandfather, which has been successively due by him and his sons, but Authority.

Annotations.

156. It (the debt) is not to be paid by the great-grandson, the wife or the others, if they have not taken the estate.—*Vyav. Mayú.*, Chap. V, Sect. iv, § 17.

156. But, to the southward, the doctrine of the *Mitákshará*, supported by the *Mádhavya* and *Chandriká*, is said to render the payment of the father's debts with interest, and the grandfather's without interest, independent of assets, a legal, as well as sacred obligation.—Stra. H. L., Vol. I, p. 167.

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has remained undischarged by them, shall be paid by the grandsons; but it is not recoverable from a person, who is fourth (in descent from the debtor)."—*Coleb.* Dig., (Cal. Ed.) Vol. I, p. 309. *Mit.*, Sans., p. 78.

Authority. KÁTYÁYANA:—If any debts exist against the father, his son shall not take possession of his effects. They must be given to his creditors; and if he die (*without*) wealth (*c*), still his son must pay his debts.*

(*c*) "*Wealth*" must be connected with '*without*.'—*Vyav. Mayú.*, Chap. V, Sect. iv, § 17.

Authority. VRIHASPATI:—Sons must pay the debt of their father, when proved, as if it were their own (that is, with interest); the son's son must pay the debt of his grandfather (but) equal (to the principal); and his son (that is, the great-grandson), shall not be compelled to discharge it [unless he be heir, and have assets].†

Exposition. Here although it is said without distinction that sons and grandsons should pay debts, yet this ought to be understood to be the difference that the son should pay them with interest just as his father would have paid, but the grandson should pay them only equal to the principal and not interest (thereon).—*Mit.* Sans., p. 75.

Further exposition. "Equal"—that is, as much as was borrowed and not interest. His son, that is, the great-grandson, who has not received inheritance, should not pay.—These three (namely), the debtor, his son, and grandson are shown to be the payers of debts, and in the case of (all of) them happening to be in existence, the grade is also shown.—*Mit.* Sans., p. 75.

Authority. VRIHASPATI:—The father's debt must be first paid, and next the debt contracted by the man himself; but the debt of the paternal grandfather must even be paid before either of those.—*Vide Coleb.* Dig., Vol. I, (Cal. Ed.), p. 273, and *Vyav. Mayú.*, Chap. V, Sect. iv, § 14.

Authority. KÁTYÁYANA:—The rule shall be the same in regard to the debts of the grandfather, which have not been discharged by grandsons, nor by his own sons, but a debt of the grandfather shall not be paid by his grandsons with interest.—*Coleb.* Dig., Vol. I, (Cal. Ed.) page 308.

KÁTYÁYANA:—After the death of his father, debts (of his grandfather) must be carefully discharged by the grandson; but a debt contracted by an ancestor is not recoverable from the fourth in descent.—*Ibid.*, p. 309.

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* Cited in the *Vyavahára-mayúkha*, &c.

† *Vyav. Mayú.*, Chap. V, Sect. iv, § 12. *Mit.*, Sans., p. 75.

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In fact, debts of the paternal grandfather become debts of the father: they are chargeable on him in the first place, next on his son, as has been already noticed: but the great-grandson of the original debtor shall not be compelled to pay the debts unless he take the assets.—*Coleb.* Dig., Vol III, page 87. Remark.

In what circumstances is he considered as holding the assets? Is it only when he becomes the (immediate) heir of his ancestor, who has survived his own son and grandson? Or (is he) likewise (considered as such) when the son succeeded to the estate on the death of the proprietor, and after him, the grandson, and on his demise the great-grandson? The answer is, when the estate of the ancestor passes successively to his son, grandson and great-grandson, this last is not the immediate heir of his grandfather, but of his own father. But he, who succeeds to the estate of another in right of his relation to him, is considered as holding assets of that person.—*Ibid.*, pp. 87, 88. Remark.

Thus the great-grandson should pay his great-grandfather's debts, which have remained undischarged, as such debts were to be paid by his father as well as grandfather, who inherited his property.

NÁRADA:—"Fathers desire male offspring for their own sake, (reflecting) this son will redeem me from every debt whatsoever due to superior and inferior beings; therefore, a son begotten by him, should relinquish his own property and assiduously redeem his father from debt, lest he should fall into a region of torment. If a devout man, or one who maintained sacrificial fire, die a debtor, all the merit of his devout austerities, or of his perpetual fire, shall belong to the creditors."—Vide *Coleb.* Dig., Vol. I, p. 299 *et seq.* Authority.

VRIHASPATI:—"He who having received a sum lent or the like does not repay it to the owner, will be born here in his creditor's house, a slave, a servant, a woman, or a quadruped."—*Ibid.* Authority.

157. Whatever the father had promised to give, whatever he had mortgaged, or whatever price he did not pay after purchasing (a thing), all these also should be discharged by the son. *Vyavastha.*

Annotations.

157. Connected with the above duty, is the discharge of obligations, resting on the intention of the deceased, sufficiently manifested; since, though nothing occurs in the Hindú law expressly in favor of the testamentary power, as exercised under other codes,

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Authority. HÁRÍTA :—A promise made in words, but not performed in deed, is a debt (of conscience) both in this world and in the next. He who gives not what he has promised, and he who takes what he has given, sinks to various regions of torment, and springs again to birth from the womb of some brute animal.—*Coleb.* Dig., Vol. III, p. 461.

Authority. KÁTYÁYANA :—What a man has promised in health or in sickness, for a religious purpose, must be given; and if he die without giving it, his son shall doubtless be compelled to give it.—*Ibid.*, p. 307.

Authority. NÁRADA :—In like manner, whatever the father had promised, whatever he had deposited, mortgaged, or whatever price he did not pay after purchasing (a thing) all these should be discharged by the son. For promise made in words, but not performed in deed, is a debt (of conscience) both in this world, and in the next. He who gives not what he has promised, and he who takes what he has given, sinks to various regions of torment, and springs again to birth from the womb of some brute animal.—*Ibid.*

Authority. KÁTYÁYANA :—That must be paid, which may have been verbally promised, as well as what has been engaged for to another.*

Authority. KÁTYÁYANA :—The judge shall compel a son to pay the debt of his father, provided he be involved in no distress, be capable of property, and liable to bear the burthen; but in no other case shall he compel the son to pay his father's debts.*

Vyavasthá. **158. Although a son and grandson should pay the debts incurred by their father and grandfather, yet neither legally nor morally are they bound to pay such of their debts as were contracted for immoral uses, (as stated in the subjoined texts,) or a fine or tolls, or sums for which they were sureties.**

Vide Precedents, pages 347, 348, 349, 352.

Annotations.

it provides distinctly for the performance of promises by the ancestor in his lifetime, to take effect after his death.—Stra. H. L., Vol. I, page 169.

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* Cited in the *Vyavahára-Mayúkha*, Chap. V, Sect. iv, § 16, 20.

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VRIHASPATI :—The sons are not compellable to pay sums due by their father for spirituous liquors, for losses at play, for promises made without any consideration, or under the influence of lust or wrath, or sums for which he was a surety, or a fine, or a toll, or the balance of either.—*Coleb.* Dig., (Cal. Ed.), Vol. I, p. 312. Authority.

YÁJNAVALKYA :—A son need not pay in this world money due by his father for spirituous liquors, for lustful pleasures, for losses at play; nor what remains unpaid of a fine or toll; nor any thing idly promised.—*Ibid.*, p. 318. Authority.

USHÁNÁ :—A fine, or the balance of a fine, as also a bribe or toll (*shulka*), or the balance of it, are not to be paid by the son, neither shall he discharge debts improper (not sanctioned by law or custom).—*Vyav. Mayú.*, Chap. V, Sect. iv, para. 15.—*Mit.* Sans., p. 71. Authority.

The debt which is incurred by drinking spirituous liquors, or for loss at play, the balance of a fine or toll, and what is uselessly given,—that is what is promised to swindlers, flatterers, wrestlers, and the like—such debts contracted by a father should not be paid by his son and the rest,—to liquor-sellers and the like. Here the expression "balance of a fine or toll" being used, it must not be understood that the whole thereof is payable.—*Ibid.* Exposition.

GOUTAMA :—Money due by a surety, a commercial demand, a toll, the price of spirituous liquors, a loss at play, and a fine shall not involve the sons of the debtor.—*Coleb.* Dig., Vol. I, (Cal. Ed.), p. 312. Authority.

VYÁSA :—Neither a fine, nor a toll, nor the balance due of either shall be (necessarily) paid by the son of the debtor; nor any debt for a cause repugnant to good morals.—*Ibid.*, page 314. Authority.

KÁTYÁYANA :—A debt of the paternal grandfather, which is proved, or which is partly liquidated, must be discharged (by the grandson); but never shall a debt, contracted for immoral uses, or which was contested by his father, (be paid by the grandson).—BHRIGU ordains, that a debt devolving from the grandfather, which was proved and acknowledged by the father, must be discharged by grandsons, if it were not contracted for immoral uses, nor already paid by the sons. *Coleb.* Dig., (Cal. Ed.), Vol. I, pp. 307, 308. Authority.

YÁJNAVALKYA :—Suretyship is ordained for appearance, for honesty and for payment; the two first (sureties, and not their son,) must pay the debt, on failure of their engagements, but even the sons of the last (may be compelled to pay it).—*Ibid.*, p. 246. Authority.

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Remark. Although according to the foregoing texts of our holy legislators, a son and son's son even without receiving inheritance, should pay such debts of their father and grandfather as were not contracted for immoral uses or for purposes as aforesaid, yet it has been decided and determined by the British dispensers of justice, that—

Vyavasthá. **159.** The debts of a deceased person follow his assets,—his heir is to pay his debts in proportion to the property inherited by him; and in the case of his not getting or taking the deceased's heritage, he is not legally bound to pay his debts, nor can he be compelled to pay the same.

Vide Precedents, pages 342—346, 348, 349, 350, 351.—See also *Vyav. Chan.*, Vol. I, Part ii, p. 624.

Remark. The doctrine of the *Shástra*, however, is that which is expressed by NÍLA-KANTHA in the following passage:—

"But receipt of ever so small a portion of the estate, imposes the liability of liquidating the debts, to whatever amount [they may be (1)]." See *Vyav. Mayú.*, Chap. V, Sect. iv, para. 17.

Vyavasthá. **160.** A minor son, although he inherited property from his late father, is not at *that age* bound by the *Shástra* to pay the debt of his father, but upon coming of age. (See Minority.)

Vide Precedents, page 348; and *Vyav. Chan.*, Vol. I, Part ii, p. 625.

Annotations.

159. Much as is said everywhere of the religious tie the son is under to pay the debts of his ancestor, it seems settled in Bengal, that it has no legal force independent of assets. But to the Southward, the doctrine of the *Mitákshará*, supported by the *Mádhavya* and *Chandriká*, is said to render the payment of the father's debts with interest, and the grandfather's without interest, independent of assets, a legal, as well as a sacred, obligation.—Stra. H. L., Vol. II, page 167.

(1) Colebrooke in his Treatise "On Obligations and Contracts" (Chap. II, para. 51) has laid it down that—'heirs succeed to the obligations of ancestor without any reference to the adequacy of the property, and the rights of inheritance must be relinquished, where its obligations are repudiated.'

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Sons while minors are not also under the religious obligation to pay their ancestors' debts, but it has been enjoined that they shall pay the same at their full age.* Thus— Remark.

KÁTYÁYANA:—On the death of a father his debt shall in no case be paid by his sons incapable from nonage of conducting their affairs; but at their full age they shall pay it in proportion to their shares: otherwise they shall dwell hereafter in a region of horror.* Authority.

It has, however, been determined by the British dispensers of justice, that—

161. Debts follow the assets. Although the heir be a minor, yet the creditor of his ancestor can realize the amount due to him, from his property inherited by the minor. See the Annotations at page 123. *Vyavasthá.*

Vide Precedents, pages 344, 348, 349, 353—355.

162. If a person, after dividing his estate and debts amongst his sons, be separate from them taking his portion, and beget another son, then the son begotten after partition shall inherit the father's property, both reserved and subsequently acquired, and pay his (portion of the) debts.† *Vyavasthá.*

VRIHASPATI:—All the wealth which is acquired by the father himself who has made a partition with his sons, goes to the son begotten by him after the partition. Those born before it are declared to have no right as in the wealth, so in the debts likewise, and also in gifts, pledges and purchases.† Authority.

The meaning is that, as the son begotten after partition is to receive the property of his father acquired after partition, so also is he to liquidate his father's debt due by him. Explanation.

Annotations.

159. Although after the death of the father, even (his) infant (son) becomes independent, yet he is not bound to pay debts. So it is said:—"He who is under age, is not bound to pay debts, even though he be independent."—*Mit.*, Sans., page 74.

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* See *Coleb.* Dig., (Cal. Ed.) Vol. I, p. 298.

† See Partition for the son begotten after partition.

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In like manner, whatever the father had promised to give, whatever he received in deposit, whatever he mortgaged, or whatever price he did not pay after purchasing (a thing), all these should be performed by him alone.

Vyavasthá. **163.** If a person after contracting a debt remain abroad for twenty years, his debt shall, after that period, be paid by his son, grandson, or the person who took his property.

Vyavasthá. **164.** If a person be incapacitated by old age, by long or incurable disease, by being wholly involved in distress, &c., or for any other reason, his son or another who manages his property, must pay his debts.

Debts must be paid by the sons, or other relatives, when they have reached their twentieth year, for, says*—

Authority. NÁRADA:—The father, or (if the family be undivided) the uncle or the elder brother, having travelled to a foreign country, the son shall not be forced to discharge the debt until twenty years have elapsed.*

Authority. VISHNU:—If he, who contracted the debt, should die or become a religious anchoret, or remain abroad for twenty years (*d*), that debt shall be discharged by his sons or grandsons, but not by remoter descendants against their will.*

Authority. YÁJNAVALKYA:—The father having gone to a foreign country, or being deceased (naturally or civilly,) or wholly

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Annotations.

164. It is not expressly said that the debt shall be paid by the son, in the lifetime of his father, who is insolvent. It is declared, however, that he shall pay the debt of the father who is oppressed by calamity, such as incurable disease, &c., and that, even though no patrimony have come into his hands. But, according to the remark of Sir William Jones, the obligation is moral and religious, not civil. See note on Jagan-nátha, Dig., b. i, clxvii.—Colebrooke. See Stra. H. L., Vol. II, pp. 277, 278.

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* *Vyav. Mayú.*, Chap. V, Sect. iv, § 13.

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immersed in vices (or difficulty,) the sons or their sons must pay the debt, but, if disputed, it must be proved by witnesses.*

KÁTYÁYANA :—If the father be at home, but afflicted with a chronic disorder (though not without hope of recovery), or absent, his debt shall be paid by his sons, after a lapse of twenty years (*d*). * Authority.

(*d*) This must be understood when the cure of the diseased is possible, or when the return of the absent (parent) may be expected. But when the distemper is deemed incurable or the return of the absent parent is impracticable, the son shall pay the debt of his father, though living, as if he were dead. The creditor need not wait twenty years.—*Ratnákara* cited in Coleb. Dig., Vol. I, (Cal. Ed.), p. 285. Explanation.

KÁTYÁYANA :—The debts of men long absent in a foreign country, of idiots, mad men, and the like, who have no male kindred, and of religious anchorets, must be paid even during their lives, by such as have the care of the (debtors') wives and goods.—*Ibid.*, p. 338. Authority.

KÁTYÁYANA :—A creditor may enforce payment of such debts from the sons of his debtors, who, though alive, are incurably diseased, mad, or extremely aged (*e*), or have been very long absent in a foreign country, (provided the sons have assets of the debtors).—*Ibid.*, p. 286. Authority.

(*e*) "Extremely aged"—that is, incapacitated by old age for the (management of) affairs.—*Ibid.* Explanation.

VRIHASPATI :—A debt of the father being proved, it must be discharged by his sons, even in his lifetime, if he were blind (or deaf) from his birth, or be degraded, insane, or afflicted with phthisis or leprosy, or any hopeless disorder.—*Ibid.*, p. 285. Authority.

HÁRÍTA :—While the father lives, sons are not independent in regard to the receipt and expenditure of wealth, and amercement (*ákshepa*). But if he be decayed, remotely absent, or afflicted with disease, let the eldest son manage the affairs as he pleases. † Authority.

SHANKHA and LIKHITA :—If the father be incapable, let the eldest son manage the affairs of the family, or, with his consent, a younger brother conversant with business. † Authority.

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* See *Vyav. Mayú.*, Chap. V, Sect. iv, § 12, 13.

† *Vide Smri. Chan.*, Chap. I, Cls. 21, 28, 30.

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Vyavasthá. **165.** The debt contracted for the family by any person connected with the family, even by a pupil, a dependant or the like, if not repaid by the *Kartá** of the family, must be liquidated by his surviving son, grandson, or the person inheriting his property, the same in fact being a debt of the *Kartá* himself.

Vide Precedents, pages 348—351.

Authority. VISHNU :—[A debt (*f*) of which payment has been] previously promised, or (which was) contracted by any person for the sake of the family, must be paid by the housekeeper. *Coleb.* Dig., (Cal Ed.), Vol. I, p. 302.

(*f*) A "debt" must be here supplied.—*Ibid.*

Authority. YÁJNAVALKYA :—If one of (two or more) undivided kinsmen contract a debt for the sake of the family (*kutumbárthé*), and either die or be very long absent abroad, the other parceners or joint tenants shall pay it.—*Mit.* Sans., p. 70. *Vide Coleb.* Dig. (Cal. Ed.), Vol. I, p. 290.

Exposition. The debt which was contracted by several undivided members, or any member, of a family, for the sake of such family (*Kutumbárthé*), should be paid by the head of the family, but upon his death or being absent abroad, the same should be liquidated by all those who inherited his property.—*Mit.* Sans., p. 70.

Remark.—The term '*Kutumbárthé*' which is composed of '*Kutumba*' (family) and *arthe* (for *or* for the sake of,) is used in many texts on the above subject. Mr. Colebrooke in his Digest has rendered the term sometimes by 'for the support of the family,' sometimes by 'for the use of the family,' sometimes by 'for the behoof of the family,' and sometimes by 'for the benefit of the family' and in so doing he seems to have followed JAGANNÁTHA whose compilation is the original of his Digest. Sir William Jones, in one text of MANU, translates it by 'for the use of the family' and in another by 'for the behoof of the family' without following the commentator KULLÚKA BHATTA, who in one text has interpreted it '*Kutumba-sambharanártham*' (for the support of the family,) and in another by '*Kutumba-byayanimittam*' (for the expenses of the family). With due deference to the two great translators, I have deemed it best to render the term '*Kutumbárthé*' by 'for' or 'for the sake of the family,' a signification consistent with the component parts of the original, and most accurate of all, and which has been afterwards adopted by Mr. Colebrooke himself in his translation of the *Mitákshará.*

* The doer of a thing, agent, master, chief, head, governor.

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KÁTYÁYANA :—A debt contracted by a brother, a paternal uncle, or a mother for the sake of the family, must be fully discharged by the co-heirs when partition is made.—*Smri. Chan.*, Chap. II, Sect. ii, Cl. 19. Authority.

VRIHASPATI :—A housekeeper shall discharge a debt contracted by his uncle, brother, son, wife, servant, pupil, or dependants, for the support of the family (during his absence).*—*Coleb.* Dig., (Cal. Ed.), Vol. I, p. 301. Authority.

It is here implied that, a debt, contracted even by others for the support of the family, must be discharged by the housekeeper.—The *Ratnákara.* See *Coleb.* Dig., Vol. I, (Cal. Ed.), page 301. Exposition.

NÁRADA :—Whatever debt has been contracted for the use of the family, by a pupil, an apprentice, a slave, a wife, or an agent, must be paid by the head of the family.—*Coleb.* Dig., (Cal. Ed.), Vol. I, p. 302. Authority.

KÁTYÁYANA :—BHRIGU ordained that a man shall pay a debt contracted for the sake of the family, in his remote absence, even without his assent, by his slave, his wife, his mother, his pupil, or his son.—*Ibid.*, p. 17. Authority.

NÁRADA :—A debt contracted before partition by an uncle, or brother, or a mother for the support of the family, all the persons or joint tenants shall discharge.—*Ibid.*, page 292. Authority.

MANU :—If the debtor be dead(*g*), and if the money borrowed was expended for the use of the family, it must be paid by that family, divided or undivided, out of their own estate.—*Ibid.*, p. 297. Authority.

(*g*) The word "dead" is illustrative (of civil death and the like).—*Ibid.*, p. 297.

MANU :—Should even a slave make a contract (*h*) (in the name of his absent master), for the sake of the family, that master, whether in his own country or abroad, shall not rescind it.—*Ibid.*, p. 302. Authority.

(*h*) "A contract"—that is, debt.—*Ibid.*

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* The principle of the law may be here stated ; should a son competent to affairs be at hand, a debt, contracted by divided brethren or the like unauthorised by him, is not valid : but, in the case of parceners, if any one of five brothers forbids the contracting of the debt, and is able to support the family by other means, the debt contracted by another brother, is due by the borrower alone, and shall not be paid by him who opposed the debt. Yet if the money (so) borrowed be used by him who opposed the debt, or by his dependant, being unable to supply sufficient funds for the support of the whole family, or of his immediate dependants, it must be discharged by him.—*Coleb.* Dig., (Cal. Ed.), Vol. I, p. 301.

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Vyavasthá. **166.** NÁRADA:—A father must equally pay the debt of his son, contracted by his own appointment, or for the support of his family, or in a time of distress.—*Coleb.* Dig., Vol. I, (Cal. Ed.), p. 305.

Vyavasthá. **167.** NÁRADA:—A debt contracted by the wife, shall by no means bind the husband, unless it were (for necessaries) at a time of distress: a man is indispensably bound to support his family.—*Ibid.*, p. 321.

Vyavasthá. **168.** If a debt be contracted by a widow or the like for the liquidation of the debts of the late owner, or for the performance of an act or acts indispensably necessary, such debt must be discharged by the reversionary heirs of the late owner.

Vide Precedents, pages 351, 352.

Vyavasthá. **169.** The debt contracted by any of the co-heirs or co-parceners of a joint family—such as a father, son, brother, brother's son or the like,—for the support of the family, or for relieving it from distress, or for the performance of the act or acts indispensably necessary,—must be repaid by all the surviving co-heirs or co-parceners of the family.

Vide Precedents, pages 348, 349, 350.

Authority. NÁRADA:—Any one surviving parcener may be compelled to pay another's *share of* a debt contracted by joint tenants; but if they be dead, the son of one is not liable to pay the debt of another.—*Coleb.* Dig., Vol. I, p. 295.

See the text of YÁJNAVALKYA and the exposition thereof in the preceding page.

Annotations.

169. Where the consideration of a debt may have been such as in its nature to charge the common fund, as for the nuptials of any of the family, the expense attending them must have been reasonable, according to the usage and means of the family; beyond which, if carried to excess, he, who so imprudently contracted it, will be alone liable, unless it have been adopted by the rest. Contracted fairly, for the use of the family, by whatsoever member of it, it binds the whole.—Stra. H. L., Vol. I, p. 167.

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SECTION II.

On Obsequies of the late Proprietor and others, and Initiation of the Children of the former.

Two motives are indeed declared for the acquisition of wealth: one temporal enjoyment, the other the spiritual benefit of alms and so forth. Now, since the acquirer is dead and cannot have temporal enjoyment, it is right that the wealth should be applied to his spiritual benefit. Accordingly Vrihaspati says:—"Of the property which descends by inheritance, half should carefully be set apart for the benefit of the deceased owner, to defray the charges of his monthly, six monthly, and annual obsequies."* By saying "to defray the charges of his monthly, &c., obsequies," his participation, and by directing "religious purposes," his spiritual benefit, are stated as reasons. So Apastamba ordains: "Let the pupil or the daughter apply the goods to religious purposes for the benefit of the deceased."† Consequently,—

170. He who inherits or takes the estate of a deceased person must perform his obsequies, &c. *Vyavasthá.*

Vide Precedents, pages 54, 59, 62, 353—355.

He who takes the estate shall perform the obsequies.—*Coleb.* Dig., Vol. III, p. 545.

Goutama:—Out of the paternal estate, *nava shráddha* (*a*) or the obsequies of the deceased must be performed, the heirs of the deceased being assembled together.‡ Authority.

(*a*) "*Nava Shráddha*" means the first series of *Shráddhas* collectively, or funeral offerings on the 1st, 3rd, 5th, 7th, 9th and 11th days after a person's demise.‡ Explanation.

Annotations.

170. As with us, necessary funeral expenses are allowed the executor, previous to all other debts and charges, to this place may be referred the duty, enjoined by Vrihaspati to the Hindú heir, of setting apart a portion of the inheritance, to defray, on behalf of the deceased, his monthly, six monthly, and annual obsequies,—on the ground of wealth being intended for spiritual benefit, as well as for temporal enjoyment.—Stra. H. L., Vol. I, p. 170.

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* See Precedents, page 353.

† See *Dá. Bhá.*, Chap. X, Sect. vi, § 13.

‡ *Vide Smriti-chandriká*, Chap. II, Sect. ii, cl. 21.

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Authority. SANGRAHA-KÁRA :—Partition subsequent to the demise of the father is to be made after the performance of *ekoddishta.*(*b*)—*Vide Smri. Chan.*, Chap. II, Sect. ii, Cl. 22.

(*b*) This is a rite performed in honor of the deceased *alone* in contradistinction to *Párvana*, or double rite.—*Vide Dattaka-mínansá*, Sect. IV, § 72, and Sect. vi, § 55.—Notes.

Authority. VRIHASPATI :—A brother, a brother's son, a *sapinda*, or pupil, performing rites with a funeral cake *for the deceased*, shall thence obtain increase (of prosperity).—*Coleb.* Dig., Vol. III, p. 545.

Authority. VISHNU says :—"He who is heir to the estate, is the giver of the funeral oblations."—*Ibid.*, p. 546.

Vyavasthá. **171. But if one be heir to the estate, and another be qualified to perform the *shráddha*, he (the former) must give sufficient property and cause the rites to be celebrated by him who is qualified to perform them.***

Vide Precedents, page 555.

Authority. KÁTYÁYANA :—Heirless property goes to the king, deducting, however, a subsistence for the females, as well as the funeral charges: but the goods belonging to a venerable priest (*Srotriya*) let him bestow on venerable priests.—See *Vyav. Mayú.*, Chap. IV, Sect. viii, § 5.

Authority. "Even the king has competency for the performance of (the deceased's) *shráddha* (*c*). In short, in default of all, the king should cause the *shráddha* of the deceased to be performed out of his inheritance."—Thus according to the *Márkandeya Purána* the king also has competency for the performance of *shráddha.*—*Nirnoya-sindhu*, Section 3rd, Leaf 22.

(*c*) The word "*shráddha*" here signifies the obsequies performed after the death of a person.*

Annotations.

171. It is not a maxim of the law, that he who performs the obsequies is heir; but that he who succeeds to the property must perform them. (3 Dig. texts cccclv, cccclvii.)—Colebrooke. See Stra. H. L., Vol. II, p. 242.

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* *Vide Coleb.* Dig., Vol. III, pp. 545, 546.

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How can the spiritual preceptor, who takes the estate of a *Kshatriya*, perform his funeral rites, since *that* is forbidden in the text, "The priest who performs the funeral rites for persons of an inferior tribe is degraded to that class in the present world and in the next?" No, for this text relates to brothers unequal in class, and the difficulty is obviated by saying, that the spiritual preceptor may accomplish the funeral rites by the intervention of a qualified person equal in class with the deceased.—*Coleb.* Dig., Vol. III, p. 546. **Remark.**

If in consequence of the heir of a deceased proprietor being in a different country there be a probability of the destruction of his property, then any one may apply his property to the purpose of his funeral obsequies as well as to the purpose of his religious merit; inasmuch as according to this text of NÁRADA—"Even any one, of his own accord, may perform the rites out of affection," he also is a substitute. This is explained *in extenso* in the *Suddhi-tattwa.*—*Dáya-tattwa,* Sans., p. 63. **Authority.**

This is admitted by the author of the *Dáya-bhága* when he says,—"The appropriation of the wealth of the deceased to his spiritual benefit in the mode which has been stated, should in every case be deduced according to the specified order."*—*Ibid.*

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172. The initiatory ceremonies of the uninitiated brother and sister must be performed out of the patrimony by their brother or brothers who have been already initiated.† ***Vyavasthá.***

Annotations.

172. Not less obligatory upon the heirs is the charge for the *initiation* of the uninitiated, and the *marriage* of the unmarried members of the family. The duty of initiating attaches to those who have themselves been initiated; and the provision for it is to be made before partition, out of the common stock. It has been already intimated, that charges of this nature, to be available against the inheritance, must be reasonable; though this is seldom attended to.—Stra. H. L., Vol. I, pp. 170, 171.

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* *Vide Dá. Bhá.*, Chap. XI, Sect. vi, § 30.

† *Dá. Kra. Sang.*, Chap. VIII, § 32.—See *Dá. Bhá.*, Chap. III, Sect. ii, para. 38.

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Authority. VYÁSA :—For any of the brothers, whose investiture and other sacraments had not been performed, the other brothers, of whom the sacraments have already been completed, shall perform those ceremonies (at the expense of the paternal estate), and for *unmarried* sisters, the sacraments shall be completed by their elder brothers, as the law requires.*

Authority. NÁRADA :—For those whose initiatory ceremonies have not been regularly performed by the father in due order, the other brothers shall perform those ceremonies at the expense of the paternal estate.*

Authority. VRIHASPATI :—For younger brothers, whose investiture and other ceremonies have not been performed, their elder brothers (*d*) shall perform them out of the collected wealth, or common estate, of the father (*e*).*

(*d*) In this text,—"Brothers" means brothers whose father is dead. "Whose investiture and other ceremonies have not been performed:" add to these words, the phrase—"by the father."†

The mention of brother brings in sisters also. Even so the same author.†

Authority. VRIHASPATI :—And those unmarried daughters who are as yet uninitiated, must be initiated by their eldest brother, even out of the father's wealth, according to the (usual) rite.†

Exposition. (*e*) "Out of the common estate" is added to show that the joint stock is meant, it being already suggested that the ceremonies must be performed out of the estate of the father, in which the youngest brother has interést: now the youngest has a claim on the common estate.—*Coleb.* Dig., Vol. III, p. 102.

Exposition. Consequently all the brothers, whether elder or younger, whether their sacraments have or have not been completed, shall contribute money for the ceremony (to be performed); but the eldest alone whose investiture has been performed is competent to conduct the ceremony.—*Ibid.*, p. 103.

Remark. Since a marriage subsequent to one which was legal cannot be considered as the last perfect rite (those ceremonies having been completed by the first contract); all the brothers shall not contribute to defray the second marriage of any one brother whose wife has deceased. He ought, however, to contract another

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* *Coleb.* Dig., Vol. III, pp. 96, 99, 101, 102.

† *Vyav. Mayú.*, Chap. IV, § 38, 39.

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marriage, to fulfil his duty, as directed by the following text, wherein 'twice born' is merely illustrative, and relates to the four classes: "But let not a twice born man remain a single instant excluded from the (four) orders."*—*Ibid.*, p. 105.

MANU says, "To the maiden sisters let their brothers give portions out of their own allotments respectively: let each give (*f*) a fourth part of his own distinct share: and they who refuse to give it, shall be degraded(1).†—Chap. IX, *verse* 118.

(f) Let each give.] From the mention of giving, (and) the denunciation of the penalty of degradation, if they refuse, it appears that portions are not taken by daughters as having a title to succession. For one brother does not give a portion out of his allotment to another brother who has a right of inheritance.—Thus,‡— Exposition.

YÁJNAVALKYA, saying "Uninitiated brothers should be initiated by those for whom the ceremonies have been already performed; but sisters should be disposed of in marriage, giving them as an allotment, a fourth part of a brother's own share" (1), declares the obligation of disposing of them in marriage, not their right of succession.‡ Authority.

Thus, [since the daughter takes not in right of inheritance] if the wealth be great, funds sufficient for the nuptials should be allotted. It is not indispensable, that a fourth part shall be assigned.‡ Exposition.

This (allotment of a fourth part if the funds be small) must be understood as applicable only where the number of sons and daughters is equal. For, if the number be unequal, either the daughter would have a greater portion, or the son would be entirely deprived of property. But that cannot be proper, since the son is principal (in relation to the inheritance).‡ Exposition.

Annotations.

(1.) Here the giving of a quarter is not intended; but property sufficient to defray the nuptials should be given, the same being ordained by VISHNU. The same opinion of the subject is held in the *Ratnākara* and in other books.—*Vi. Chi.*, p. 248.

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* If he have no wife living, he is no longer in the order of a married man. To continue in the order of a housekeeper he must therefore contract another marriage.—Note by Mr. Colebrooke. *Ibid.*, p. 106.

† *Dá. Bhá.*, Chap. III, Sect. ii, § 36. See *Coleb.* Dig., Vol. III, p. 92.

‡ *Dá. Bhá.*, Chap. III, Sect. ii, § 37—40.

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The author of the *Vivada-bhangárnava*, after quoting, and acquiescing in, the above opinion of JÍMÚTA-VÁHANA, adds as follows :—"A fourth part of a share must be given to sisters; but if they be twice or thrice as numerous, they would receive a greater sum than their brothers; if they be four times as numerous the brothers would be deprived of their shares; if they be five times as numerous, the case would be very puzzling. Yet such a case may occur. The rule for giving a quarter of a share cannot (therefore) be received without exception. In fact, the rule only bears that a brother shall give a fourth if he have a considerable allotment."—*Coleb.* Dig., Vol. III, p. 93.

To daughters, however, property sufficient to defray the expenses of marriage should be given as is said by*—

Authority. DEVALA :—A nuptial portion should be given to unmarried daughters out of (their) father's estate.*

Exposition. The texts which ordain the allotment of a fourth share (to a maiden daughter,) are to be construed to signify the allotment of property sufficient for marriage.* So,—

HALÁYUDHA and others hold, that 'so much only should be given as is sufficient to defray the expence of the sacrament *or marriage*: but a fourth part is mentioned by way of example.'—*Coleb.* Dig., Vol. III, p. 92.

Vyavasthá. **173.** If the sisters be few in number compared with the brothers, or if there be only one brother or no brother, the initiations of the unmarried daughters of the late owner must be performed in proportion to the wealth.

But if sisters be few in number compared with the brothers, or if there be no brothers, another rule of VISHNU must be adduced :†

Authority. VISHNU :—The marriage and other ceremonies of unmarried daughters must be defrayed in proportion to the (inherited) wealth.†(1)

Annotations.

(1) The text of VISHNU :—"The initiations of unmarried daughters are to be performed in proportion to his own wealth," is applicable either in a case where no partition takes place from there being an only son, or to a case where brothers live in union.—*Smri. Chan.*, Chap. IV, Cl. 36.

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* *Dá. Ta.*, Chap. III, § 19, 20. See *Coleb.* Dig., Vol. III, p. 96.

† *Coleb.* Dig., Vol. III, pp. 93, 94. See *Dá. Ta.*, Chap. III, § 19.

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The *shráddha*, &c., of the late proprietor and the initiatory (nuptial) ceremony of his daughter should be provided out of the inheritance where it has descended to a single heir.—*Coleb.* Dig., Vol. I, (Cal. Ed.), p. 226. Authority.

174. If the estate be small, or if there be no patrimony, the initiated brothers must, even out of their own funds, perform the initiatory ceremonies of their uninitiated brothers and sisters. *Vyavasthá.*

KÁTYÁYANA :—For unmarried daughters a fourth share is ordained, and three shares for sons; but if the estate be small, a daughter is considered as having a right *to a sufficient portion, without determining the rate.*—*Coleb.* Dig., Vol. III, p. 97. Authority.

The *Ratnákara* has this comment: 'If the portion fixed at a fourth part of a brother's allotment be insufficient, and a larger sum be required to defray the charges of the nuptial ceremony, a girl has a right to that sum wherewith her marriage may be defrayed: so much, therefore, must be given by a brother, out of his own allotment, to defray his sister's nuptials. * * * Nor should it be objected, why has not this mode been noticed by JÍMÚTA-VÁHANA? It was his independent choice *to omit it.* The sense of the text is, if the whole estate be small, daughters have a right, that is, a claim, similar to property.—According to this construction, the texts of DEVALA and the rest may relate to the case where the estate is small; and the allotment of more than a fourth share is, therefore, authorised.'—*Ibid.* Exposition.

NÁRADA :—If no wealth of the father exist, the ceremonies(*g*) must, without fail, be defrayed by the brothers already initiated, contributing funds out of their own portions.* Authority.

(g) The word "ceremonies" takes here the above limited sense as the text says "must without fail be performed," and as marriage, &c., are not ceremonies that must, *without fail,* be performed, the law permitting the life of celibacy to a perpetual student (*Noishthika Brahma-chárí*).—*Smri. Chan.*, Chap. IV, Clause 42.

In the case of daughters, however, the word "ceremonies" used in the (above) text denotes marriage, there being no *Upanayana* for them. If there be no patrimony, the marriage must be performed by the contribution of funds of their brother's own estate, marriage with females taking the place of "*Upanayana*" with males, as such being indispensable.—*Ibid.*, Cl. 44. Exposition.

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* *Dá. Bhá.*, Chap. III, Sect. ii, § 41. *Dá. Kra. Sang.*, Chap. VIII, § 32. *Coleb.* Dig., Vol. III, p. 99. *Smri. Chan.*, Chap. IV, Cl. 41.

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JAGAN-NÁTHA'S exposition of the above text runs thus, "It should not be argued from this text of NÁRADA, that if there be no property left by the father, the nuptial ceremony must be defrayed out of their own acquired property received in alms or the like. That is not admitted by JÍMÚTA-VÁHANA. He thinks that NÁRADA propounds the mode of effecting the investiture and other ceremonies for a brother, when there is no property left by the father."

Exposition. JAGAN-NÁTHA then quotes the following text of NÁRADA (*viz.*,) "For any of the brothers, whose investiture and other ceremonies had not been performed by the father in due order, the other brothers shall perform those ceremonies at the expence of the paternal estate;" and says, "But others hold, that, reasoning from analogy, the marriage of a sister must be defrayed *by brothers* out of their own acquired property; else, it would be imputed as a great offence to the father, that the marriage of his daughter did not take place. JÍMÚTA-VÁHANA himself has used arguments drawn from analogy, in treating of inheritance. For example, in commenting on the text of YÁJNAVALKYA, which denies the participation of a wife to whom female property has been already given,* he quotes the text concerning a superseded wife;* now this is an argument drawn from analogy; and that which is established in one case, is applicable to another, unless a special objection occur. No difficulty is even supposed upon the interpretation of those who consider the feminine as understood in the masculine terms of the text."—*Coleb.* Dig., Vol. III, pp. 98—100.

Vyavasthá. **175.** Authors consider the portion assigned as intended only for indispensable sacraments. *Coleb.* Dig., Vol. III, p. 94.

Annotations.

175. The order of performing them is this: first the rite on the birth of a male should be performed; next the ceremony of giving a name and so forth; and among persons for whom a ceremony is to be performed, it should be first done for the eldest, and last for the youngest: but the ceremony of boring the ears is no rite necessary to perfect *the twice-born man.* In respect of brothers by different mothers, there is no particular order to be observed. Such is the opinion of RAGHU-NANDANA. To discuss this subject further, would be superfluous.—*Coleb.* Dig., Vol. III, p. 107.

* Both these texts are to be found in the section on the wife's or mother's participation in the Book on Partition.

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The sacraments or initiatory ceremonies that must be performed by brothers are—" 1 *Játa-karma*, 2 *Náma-karana*, 3 *Nish-kramana*, 4 *Anna-práshana*, 5 *Chúrá-karana*, 6 *Upanayana*, and *Viváha*" (marriage).*

All of these ceremonies, however, concern men of twice born classes: they do not concern men of the fourth class, that is the *Shúdras*.

Marriage is the only sacrament for a man of the *Shúdra* class. Thus *Bráhma-purána*: "A man of the servile class universally(*e*) obtains marriage as his only sacrament."*

(e) The word "universally" denotes that marriage alone is constantly required.*

It should, however, be observed, that to acquire the rank of *Sat* (pure) *Shúdra* it is necessary for the offspring of a respectable *Shúdra* to perform the tonsure and other ceremonies.*

176. Brothers and sisters only, and not their children, are entitled to be initiated out of the undivided paternal wealth. *Vyavasthá.*

Annotations.

176. See *Mit.* on Inh., Chap. I, Sect. iv, para. 19. See Id., Chap. I, Sect. v, para. 2. See Id, Chap. I, Sect. vii, para. 4. Where the initiatory ceremonies, terminating with marriage, are directed to be performed for brothers, but without any mention of nephews. *Colebrooke's* Remarks.—Stra. H. L., Vol. II, p. 287.

176. They, (*i.e.*, the initiatory ceremonies) regard brothers and sisters only, not extending to collaterals.—Stra. H. L., Vol. I, p. 171.

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(1) A ceremony ordained on the birth of a male, before the section of the naval string, and which consists in making him taste clarified butter out of a golden spoon.

(2) Ceremony of giving a name, performed on the eleventh, twelvth, or even the hundred and first day.

(3) Carrying the child out of the house to see the moon, on the third lunar day of the third light fortnight from his birth; or to see the sun in the third or fourth month.

(4) Feeding the child with rice in the sixth or eighth month, or when he has cut teeth.

(5) The ceremony of tonsure, performed in the second or third year after birth.

(6) Investiture with the mark of the class, that is the sacred thread, performed in the eighth year from the conception of a *Bráhmana*; but it may be anticipated in the fifth, or be delayed to the sixteenth year. See the section treating of the age of an adopted son.

* *Vide Coleb.* Dig., Vol. III, pages 95 and 100.

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SECTION III.

On Maintenance.

Preliminary remarks.

Although according to the rules of inheritance the nearest relatives of a deceased person inherit his estate provided they be capable of inheriting,* and according to the immemorial and prevalent custom, only one of the nearest relatives of the deceased takes his whole estate to the exclusion of the rest,† yet so anxiously careful has the law been that there shall exist no ultimate distress in the helpless members of his family, while means exist to prevent it, that it declares such persons to be entitled to maintenance out of his estate, since it was the bounden duty of the late proprietor to maintain them. Thus Manu:—"He who bestows gifts on strangers with a view to worldly fame, while he suffers his family to live in distress, though he has power to support them, touches his lips with honey, but swallows poison: such virtue is counterfeit"—"Even what he does for the sake of the spiritual body, to the injury of those whom he is bound to maintain, shall bring him ultimate misery both in this life and in the next." So also Vrihaspati: "A man may give what remains after food and raiment of his family: the giver of more (who leaves his family naked and unfed) may taste honey, but shall afterwards find it poison."‡ Thus every person while living is bound to support his family, and he having been so, the successor to his estate is also bound to support them; inasmuch as the heir who takes the deceased's estate does not take it solely for himself, but also for the performance of acts beneficial to him in the after-life.§ Now a very great benefit is done to the soul of the deceased by supporting his family, as he is doomed to hell if they suffer for want of the necessaries of life; as Manu positively declares:—"The support of persons who should be maintained, is the approved means of attaining heaven. But hell is the man's portion if they suffer. Therefore, (let the master of a family) carefully maintain them."‖ Consequently,—

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* See the Chapter on Exclusion from Inheritance.

† See the Chapter on Custom or Usage, *ante*, pp. 111—112.

‡ Manu, Chap. XI, *vs.* 9 & 10. See *Coleb.* Dig., Vol. II, p. 131.

§ See *ante*, pp. 137, 138, and Precedents, p. 59.

‖ See *Dá. Bhá.*, Chap. II, § 23.

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177. The members of the deceased's family who were, or were to be, supported by him are also to be supported out of his estate or by the person inheriting the same. *Vyavasthá.*

JÍMÚTA-VÁHANA :—Because maintenance of the family is an indispensable obligation.—*Dá. Bhá.*, Chap. II, § 23. Authority.

NÁRADA :—A man is indispensably bound to support his family.—*Coleb.* Dig., Vol. I, p. 301. Authority.

Remark.

The declarations, as above, of MANU, NÁRADA, JÍMÚTA-VÁHANA and other authorities have, however, been considered to be applicable not to the family in general, but to those members thereof whom the late owner was bound to support even by using irregular means. Almost all of such members have been specified in the following text of MANU :—

MANU declared that "a mother and father, in their old age, a virtuous (*Sádhwí*) wife, and infant son must be maintained Authority.

Annotations.

177. Maintenance by a man of his dependants is, with the Hindús, a primary duty. They hold, that he must be just, before he is generous, his charity beginning at home ; and that even *sacrifice* is mockery, if to the injury of those whom he is bound to maintain. Nor of his duty in this respect are his children the only objects, co-extensive as it is with his family, whatever be its composition, as consisting of other relations and connexions, including (it may be) illegitimate offspring. It extends to the outcast, if not to the adulterous wife ; not to mention such as are excluded from the inheritance whether through their fault, or their misfortune ; all being entitled to be maintained with food and raiment at least, under the severest sanctions. A benevolent injunction ! existing at no time ever to the same extent under our own law ; which professes little of the kind, since the time that it has been competent with us for a man to dispose by will of the whole of his property, real and personal, without regard to the natural claims of wife and issue, to say nothing of more distant ties ; a latitude, not approved by (Blackstone) the author of the commentaries ; who, in noticing the power of the parent so to disinherit his children, thought it had not been amiss, if he had been bound to leave them at least a necessary subsistence ;—or, as the same sentiment has been expressed, in their peculiar manner, by the highest Hindú authorities, "Who leaves his family naked and unfed, may taste honey at first, but shall afterwards find it poison." The obligation extends, under particular circumstances, to responsibility for each other's debts, in a degree unknown to our law, as will be subsequently seen.—Stra. H. L., Vol. I, pages 67, 68.

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even though doing a hundred times that which ought not to be done."* Therefore,—

Vyavasthá. **178.** The person inheriting the property of a deceased owner is legally bound to maintain his old mother and father *(a)*, virtuous wife, infant son, daughter and sister *(b)*.

Vide Precedents, pages 355—367, 372, 373, 377.

Explanation. (*a*) As the term "son" signifies the grandson and great-grandson as well as the son†, it is to be understood that the terms "mother and father" comprehend also the 'sonless grandmother and grandfather and also the great-grandmother and great-grandfather whose son and grandson are dead:'—in like manner, the term "infant son" comprehends also the fatherless grandson and daughter, and 'the great-grandson and daughter whose father and grandfather are dead.

Explanation. (*b*.) Infant sister.] It having been determined that the unmarried sister must be initiated (in marriage), *á fortiori* it is implied that she must be maintained until her marriage; and the text—"Their daughters too must be maintained until provided with husbands,"‡ is applicable to this case also, according to the maxim—"The sense of the law, as ascertained in one instance, is applicable in others also, provided there be no impediment."§

Vyavasthá. **179.** A step-mother has a legal claim to be maintained out of the estate left by her deceased husband, or by her step-son inheriting his estate.

Vide Precedents, pages 357, 378, 379.

The general doctrine respecting the right of a widowed daughter-in-law to maintenance is, that—

Vyavasthá. **180.** If the daughter-in-law inherited or received so much property from her late husband or any other person as to be sufficient for her support, her father-in-law is not, in that case, bound to maintain her; but if she received no such property, then the father-in-law is to support her, in the

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* See *Coleb.* Dig., Vol. III, pp. 406, 460.

† See *ante*, page 20, and annotations, pages 29, 30.

‡ *Vide infra*, p. 151.

§ *Vide Dá. Bhá.*, Chap. III, Sect. ii, § 31 annotation;—*Coleb.* Dig., Vol. III, pp. 99, 106;—and Precedents, p. 203.

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case of her having been engrafted in his family by him or by his permission: in other cases, he is not legally, but morally bound to support her.

Vide Precedents, pages 372, 374, 375, 377.

VRIHASPATI :—A decision must not be made by having recourse solely to the letter of the written codes, since if no decision were made according to the reason of the law, there might be a failure of justice.—*Coleb.* Dig., Vol. II, page 128. Authority.

181. The head of a family having been *morally* bound to support his relatives other than those above mentioned, his successor too, is so bound to maintain them. *Vyavasthá.*

182. The relatives, who on account of defects, or by the force of custom, are excluded from inheritance, are legally entitled to be maintained out of the late proprietor's estate, which, but for the prevalent custom or their own defects, they would have inherited together with the inheritor. *Vyavasthá.*

Vide Precedents, pages 378, 379.

Persons excluded from inheritance for a defect or defects are—"an impotent person, an outcast, his issue, a person born blind or deaf, one lame, a mad man, an idiot, one dumb, one who has lost the use of a limb or limbs, a leper with ulcers, one afflicted with an incurable disease unexpiated for, an enemy to his father, a hypocrite or a person wearing the token of religious mendicity, one who has assumed another order, and the rest." See the Chapter on Exclusion from Inheritance. Premising impotent persons and the rest, says— Explanation.

MANU :—But it is just that the heir who knows his duty should give to all of them food and raiment for life, without stint, according to the best of his power: he who gives them nothing, shall sink assuredly to a region of punishment.—*Coleb.* Dig., Vol. III, p. 318. Authority.

Annotations.

182. These, the impotent man, and the rest, are excluded from participation. They do not share the estate. They must be supported by an allowance of food and raiment only, and the penalty of degradation is incurred if they be not maintained.—*Mit.* In., Chap. II, Sect. x, § 5.

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Authority. DEVALA:—Food and raiment should be given to them excepting the outcast.*—*Dá. Bhá.*, Chap. V, § 11.

Authority. Although they be excluded, they ought to be maintained, excepting, however, the outcast and his son.—*Ibid.*

Authority. BOUDHÁYANA:—Persons incapable of transacting business, blind, idiots, those who are immersed in vice, or afflicted with incurable diseases, and even those who neglect their duties, but not the degraded nor their issue, let the heir supply with food and raiment.*

Authority. YÁJNAVALKYA:—An outcast and his issue, an impotent person, one lame, a mad man, an idiot, a blind man, a person inflicted with an incurable disease, must be maintained excluding them, however, from participation.*

Vyavasthá. **183.** The wives of the impotent persons and the rest, if chaste, must be maintained for life; their daughters, too, must be supported so long as they are not disposed of in marriage.*

Authority. The term "virtuous (*Sádhwí*)" being used in the foregoing text of MANU,† it is implied that—

Vyavasthá. **184.** An adulterous wife is not entitled even to maintenance. See *ante*, page 36.

Vide Precedents, pages 371, 372, 376.

Annotations.

183. Their daughters or the female children of such persons, must be supported until they be disposed of in marriage. Under the suggestion of the word "likewise," the expenses of their nuptials must be also defrayed.—*Mit.* Inh., Chap. II, Sect. x, § 12, 14.

183. The wives of these persons (*i. e.*, the impotent person and the rest), being destitute of male issue, and being correct in their conduct, or behaving virtuously, must be supported or maintained. But if unchaste, they must be expelled; and so may those who are perverse (*prati-kúlá**). These last may indeed be expelled; but they must be supported, provided they be not unchaste. For a maintenance must not be refused solely on account of perverseness.—*Ibid.*, § 15.

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* See *Coleb.* Dig., Vol. III, pp. 303—305, 316, 321; and *Dá. Bhá.*, Chap. V, § 10—12. See also the Chapter on exclusion from inheritance.

† See *ante*, page 147.

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YÁJNAVALKYA:—Their daughters must be maintained likewise, until they are provided with husbands. Their childless wives, conducting themselves aright, must be supported; but such as are unchaste should be expelled, and so indeed should those who are perverse [*prati-kúlá*].* *Dá. Bhá.*, Chap. V, § 19. Authority.

Again, the term 'wife' being indicative of 'woman' in general,†

185. The mother and the rest also, if unchaste, are not entitled to maintenance.‡ *Vyavasthá.*

Vide Precedents, pages 192, 203—204, 356, 362—367, 372, 376.

186. If the wife or any such member of the family as must be supported, was expelled or forsaken without a good cause, then they must have maintenance from the head of the family during his life, and out of his assets after his death. *Vyavasthá.*

Vide Precedents, pages 368, 374, 376.

187. Separate maintenance is to be allowed to that member of the family who for a just cause could not live in, and mess with, the family. *Vyavasthá.*

Vide Precedents, pages 160—368, 375.

188. Should a woman without unchaste purposes quit the family house, and live with her parents or other relations, she cannot thereby forfeit her right to maintenance. *Vyavasthá.*

Vide Precedents, pages 356, 362—367.

189. The widow, however, is not entitled to maintenance by residing elsewhere without a just cause, if she was directed by her husband to be maintained in the family house, and not elsewhere. *Vyavasthá.*

Vide Precedents, pages 367, 368.

190. The son begotten by a *Bráhmana*, *Kshatriya* or *Voishya* on a female slave or kept mistress, *Vyavasthá.*

* In his Digest (Vol. iii, p. 324), Mr. Colebrooke has rendered the word "*prati-kúlá*," by '*traitorous*.'

† See *ante*, pp. 66, 69—71, and Precedents, pp. 181—185, 202, 203, 209.

‡ See *ante*, pp. 66, 69, and Precedents, pp. 181—185, 200, 202, 203, 204, and 209.

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is entitled to a suitable maintenance out of his father's estate, and not to inherit it.

Vide Precedents, pages 373, 379.

Vyavasthá. **191.** The amount of maintenance should be fixed in consideration of the receiver's rank and position in life, as well as of the extent of the estate.

Vide Precedents, pages 359—361, 368.

Vyavasthá. **192.** If means allow, not only food and raiment should be supplied, but also a sum for the performance of religious acts and ceremonies, and the amount for this purpose should be fixed according to the above rule.

Vide Precedents, pages 359—361, 368, 372, 373.

Vyavasthá. **193.** If, however, there exist in a family a long established and prevalent custom with respect to allowing or not allowing maintenance to a particular relative, or in a particular case, such custom is to be acted upon in preference to any rule whatever of the law. See the Chapter on Custom or Usage.

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BOOK II.

ON MARRIAGE AND STRÍ-DHANA.

CHAPTER I.

ON MARRIAGE.

SECTION I.

ON THE NECESSITY OF CONTRACTING MARRIAGE.

194. Marriage amongst us, Hindús, though essentially a religious sacrament (being the last of the initiatory rites prescribed for men of the regenerate classes, and the only one for women and *Shúdras*),* partakes also of the nature of a Civil contract. *Vyavasthá.*

Vide Precedents, pages 381—393.

By oblations to fire during the mother's pregnancy, by holy rites on the birth of the child, by the tonsure of his head with a lock of hair left on it, by the ligation of the sacrificial cord, are the seminal and uterine taints of the three classes wholly removed. The same ceremonies (except that of the sacrificial thread), must be duly performed for women at the same age and in the same order, that the body may be made perfect, but without any texts from the *Veda*. The nuptial ceremony is considered as the complete institution of women, ordained for them in the *Veda*, together with reverence to their husbands, dwelling first in their father's family, the business of the house, and attention to the sacred fire.—MANU, Chap. II, *v.* 27, 66, 67. **Authority.**

The nuptial ceremony is the only one ordained in the *Veda* in respect of women: it is said by MANU and others to be (as their) *upa-nayana* (ligation of the sacrificial thread); their rendering service to their husbands is (equal to) their staying in the family of the *guru* and studying the *Veda*, and **Authority.**

Annotations.

194. Marriage, among the Hindús, is not only a civil contract, but a sacrament, forming the last of the ceremonies prescribed for the three regenerate classes, and the only one for *Shúdras*.—Macn. H. L., Vol. I, pp. 57, 58.

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* See *ante*, pages 143—145.

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the performance of the household duties is (equal to) the performance of the morning and evening *homa* (oblation to fire), and attention to the sacred fire: thus marriage being substituted for *upa-nayana*, the latter is not ordained for the female sex.—KULLÚKA BHATTA.

Authority. Marriage is the only sacrament for a man of the servile (*i.e.*, the *Shúdra*) class. Thus *Brahma-purána*:—"A man of the servile class universally obtains marriage as his only sacrament." The word "universally" denotes that marriage alone is constantly required.—*Coleb.* Dig., Vol. III, page 95.

Vyavasthá. **195. To contract a marriage is obligatory, not only on the female sex, but also on the male, who after passing the first order of life, must embrace the second, that is, the order of *grihí* (married house-keeper), the chief and most respectable of the four orders, and after discharging his obligations and duties as a *grihí*, he may assume the third or fourth order, or, remaining in the second, may apply his mind to final beatitude.***

Annotations.

195. The learned say that the ceremonies of marriage of daughters are obligatory.—*Varadárájya, Vyavahára Nirnoya*, page 11.

195. Four orders are prescribed for *Bráhmanas* (namely, the order of)—the married housekeeper (*grihí* or *grihastha*),—the student of the *Veda* (*Brahma-chárí*)—the hermit (*Vána-prastha*),—and the anchorite (*Bhikshu, Sanyásí* or *Yati*). For *Kshatriyas* are ordained (the first) three orders, and two (*i.e.*, the orders of) *Brahmachárí* and *grihí*, for *Voishyas*. The only order to be entered by *Shúdras*, is that of *grihí* or *grihastha*.—*Vámana-purána*.

The student (of the *Veda*), the married man, the hermit, and the anchorite are the offspring, though in four orders, of married men keeping house.—But of all those, the housekeeper, observing the regulations of the *Shruti* and *Smriti*, may be called the chief, since he supports the three *other orders*.—As all rivers, male and female, run to their determined place in the sea, thus men of all other

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* See *ante*, pp. 140, 141. MANU, Chap. IV, *v.* 257, and Chap. VI, *vs.* 35, 36, &c.

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Thus the *Veda*:—A *Bráhmana*, immediately on being born, is produced a debtor on three obligations: to the holy saints, for the practice of religious duties; to the gods, for the performance of sacrifices; to his forefathers, for offspring. Or he is absolved from debt who has a son, has performed sacrifices and practised religious duties.—*Vide Dattaka-mímánsá*, Sec. I, § 5. Authority.

So also MANU:—When he has paid three debts, *to the sages, the manes, and the gods*, let him apply his mind to final beatitude; but low shall he fall, who presumes to seek beatitude without having discharged those debts. After he has read the *Vedas*, in the form prescribed by law, has legally begotten a son, and has performed sacrifices to the best of his power (and has thus paid his debts), he may then apply his heart to eternal bliss. But if a *Bráhmana* have not read the *Veda*, if he have not begotten a son, and if he have not performed sacrifice, yet shall aim at final beatitude, he shall sink to a place of degradation.—Chapter VI, *verses* 35—37. Authority.

Annotations.

orders repair to their fixed place in the mansion of the housekeeper.*—As all creatures subsist by receiving support from air, thus all orders of men exist by receiving support from housekeepers;—and, since men of the three orders are nourished by them with divine learning and with food, a housekeeper is, for this reason, of the most eminent order.†—Let a *Bráhmana*, having dwelt with the preceptor during the first quarter of a man's life, pass the second in his own house, when he has contracted a legal marriage.‡

195. By no people is greater importance attached to marriage than by the Hindús. It is among them, with one sex (the female), indispensable. With the other, it constitutes the order of *housekeeper* (*grihastha*), the second, and the most respectable of the four by which with them the different periods of human life are distinguished. It completes for the man the regenerating ceremonies, expiatory, as it is believed, of the sinful taint that every child is supposed to contract in the parent's womb, and being, for the *Shúdras* and for women, the only one that is allowed. Its obligatoriness is, as to the latter, among the ordinances of the *Veda*.—Stra. H. L., Vol. I, p. 35.

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* MANU, Chap. VI, *vs.* 87, 89, 90. † MANU, Chap. III, *vs.* 77, 78.
‡ MANU, Chap. IV, *verse* 1.

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Authority. If (a man) fail to obtain a girl (in marriage), he must perform the (expiatory) vow (called) "the *Snátaka*."—*Udváha-tattwa*.

For a *Shúdra* also marriage is indispensably necessary; inasmuch as his duty is to enter the order of *grihí* and no other, and one cannot be a perfect *grihí* without a wife, and marriage is the only sacrament which completely removes his seminal and uterine taints, and renders him a pure *Shúdra*.—See *ante*, page 154.

Vyavasthá. **196.** The following texts go to show that human beings have been divided into two sexes, in order that, being united by matrimony, they may propagate their species, perform their duties to God and His creatures, and attain the other purposes of life; and that a man is not perfect unless he be consisting of three persons united, himself, his wife, and his son.

Authorities. To be mothers, were women created, to be fathers, men; religious rites, therefore, are ordained in the *Veda* to be performed '*by the husband* together with the wife.'*—The wise call not the habitation (alone) the home, for the wife is called by that name (*griha*), and with her, indeed, a man attains all the purposes of life.†—'From wife alone proceed offspring, good household management, solicitous attention, most exquisite caress, and that heavenly beatitude which she obtains for the *manes* of ancestors and for (the husband) himself.—The production of children, the nurture of them when produced, and the daily superintendence of domestic affairs are peculiar to the wife.—Let the housekeeper (*grihastha*) perform the domestic religious rites with nuptial fire according to law, and the ceremonies of the five great sacraments (*a*), and the several acts which must day by day be performed.'‡

Annotations.

196. The consideration of it, regarded as the foundation of a family of which the husband is the head, involves, not only the reciprocal duties of man and wife, but the derivative ones also of parent and child, guardian and ward.—Stra. H. L., Vol. I, p. 36.

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* MANU, Chap. IX, *v.* 96. † VRIHASPATI, 2 Dig. 400.
‡ MANU, Chap. IX, *vs.* 27, 28, & Chap. IV, *v.* I.

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(a) Teaching and studying the scripture is the sacrament of the *Veda*; offering cakes and water, the sacrament of the *manes*; an oblation to fire, the sacrament of the deities: giving rice and other food to living creatures, the sacrament of spirits; receiving guests with honor, the sacrament of men.—MANU, Chapter III, *verse* 70. Explanation.

MANU:—Then only is a man perfect, when he consists of *three persons united*—his wife, himself, and his son; and thus have learned *Brâhmanas* announced this *maxim*:—"The husband is even one person with his wife, *for all domestic and religious, not for all civil, purposes.*"—Chap. IX, *verse* 45. Authority.

SECTION II.

ON BETROTHMENT, &c.

197. Betrothment properly made constitutes marriage, though not complete and irrevocable without the performance of the subsequent ceremonies. *Vyavasthâ.*

Vide Precedents, pages 190—193.

MANU:—A damsel, indeed, whose husband shall die after troth verbally plighted, *but before consummation*, his brother shall take in marriage according to this rule.—Chap. IX, *v.* 69.

After citing the above text, VIJNÁNESHWARA observes: "It appears from this passage that he, to whom a damsel Remark.

Annotations.

197. Sir Thomas Strange says,—"The betrothment, once effected, by the bride and bridegroom walking seven steps hand in hand, during a particular recital, the contract is perfected upon their arriving at the seventh step, and may be enforced by the husband on completion of the time."*—Stra. H. L., Vol. I, p. 37.

* But that is not correct, as betrothment is not effected by walking seven steps, which is a ceremony performed after several matrimonial rites, as will subsequently appear. (See Colebrooke's Essay on the Religious Ceremonies of the Hindûs, Asiatic Researches, Vol. VII, pp. 288—311.) And, not constituting marriage irrevocable, but being retractable for a good cause, it cannot be enforced by the husband.

It has been laid down in Sec. 26 of the Indian Contract Act (Act IX of 1872), that every agreement in restraint of the marriage of any person other than a minor is void.

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was verbally given, is her husband without a formal acceptance on his part."—*Mit.* Inh., Chap. I, Sec. x, § 11.

MITRA MISRA, however, is of opinion that the man to whom a damsel is verbally affianced is not *then* her husband to all intents and purposes; inasmuch as he could not become so, before the contract was perfected by the marriage couple walking hand in hand seven steps with recital of particular *mantras;* and that, as for VIJNÁNESHWARA'S styling the man to be the damsel's husband, it must be taken in the sense of his being the would-be husband of the damsel, by reason of their being betrothed to one another.—See *Víra-mitrodoya* (Sans.), page 186, (New Ed., pages 603, 604).

Authority. KÁSHYAPA :—Daughters of the seven twice-married women must be shunned as girls of the lowest birth; and she who has been verbally or mentally betrothed, on whose arm a bracelet has been auspiciously tied, who has been given away after touching water, whose hand has been taken by a bridegroom, who has been approached with nuptial fire, and the daughter of a twice-married woman.*—*Shuddhi-tattwa.*

Authority. RAGHU-NANDANA :—On the death of a damsel verbally betrothed, the families of both her father and husband contract impurity for three days.—*Shuddhi-tattwa.*

Conclusion. Thus from the circumstance of the man to whom a girl was verbally betrothed being termed (her) 'husband,' and the betrothed damsel when married to a different man being styled 'twice-married,' and both families contracting impurity on the death of a betrothed damsel,† it is clear that betrothal constitutes marriage, but not complete and irrevocable without the subsequent ceremonies.

Authority. So NÁRADA :—Previous to the union of man and wife, the betrothal takes place; the betrothal and the marriage ceremony together constitute lawful wedlock.—Chap. XII, *verse* 2.

So also MANU :—The nuptial texts are a certain rule in regard to wedlock; and the bridal contract is known by the learned to be complete *and irrevocable* on the seventh step *of the married pair, hand in hand, after those texts have been pronounced.*—*Coleb.* Dig., Vol. II, p. 484.

Therefore marriage is not valid without all the ceremonies, from the junction of hands, to the seventh step of the married pair. "Bridal contract;" perfect bridal contract.—RUGHU-NANDANA.—*Ibid.*

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* *Vide Coleb.* Dig., Vol. II, p. 482.

† *Suddhi-tattwa.*

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Thus betrothal not constituting, by itself, a complete marriage,—

198. Betrothed girls, on the death of the men to whom they were affianced, or for any other good cause, are usually married to other persons; only the men who marry them are somewhat lowered in caste and society. Further,— *Vyavasthá.*

199. Troth, verbally plighted, may be retracted, if a preferable suitor present himself, or for any other good cause; such contract being neither binding nor constituting a complete marriage. *Vyavasthá.*

Vide Precedents, pages 390—393.

The above practice seems to have been founded, not only on the above texts of NÁRADA and MANU, but also upon the following texts:— Authorities.

1. If her husband die after a damsel has been given to him with water (poured on his hand), and troth verbally plighted, but before she has been contracted to him by holy texts, that virgin belongs to her father alone.*—2. Once is a damsel given in marriage; he who detains her shall incur the punishment of a thief: but if a worthier bridegroom offer, he may take the damsel, though given away (provided the first were undeserving).†—3. Should a man depart after giving the nuptial gratuity, it becomes the exclusive property of the damsel; she must be detained one year, and may (afterwards) be legally given in marriage to another: but if tidings arrive, she must wait three years, and after that period the girl may be given to another at pleasure.‡ See *Coleb.* Dig., Vol. II, pp. 487, 489, 491.

YÁJNAVALKYA:—The damsel, though betrothed, may be withheld, if a preferable suitor present himself.§ Authority.

One who has verbally given a damsel (in marriage), but retracted the gift, must be fined by the king, in proportion to (the amount of) the property, or (the magnitude of) the offence, and according to the rank of the parties, their qualities, and other circumstances. This is applicable, if there be no sufficient motive for retracting the engagement. But, if there be good cause, he shall not be fined, since retraction is authorized in such a case.—*Mit.*, Chap. II, Sec. xi, § 27. Exposition.

* VASHISHTHA cited in the *Aparárka, Smriti-chandriká, Nirnoya-sindhu* and *Viváda-bhangárnava.*

† YÁJNAVALKYA cited in the *Nirnoya-sindhu* and *Viváda-bhangárnava.*

‡ KÁTYÁYANA cited in the *Nirnoya-sindhu* and *Viváda-bhangárnava.*

§ *Vide Mit.* Inh., Chap. II, Sect. xi, § 27.

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Vyavasthá. **200.** If a damsel is betrothed to several persons, and the first bridegroom arrive before the second nuptials are completed, then, of all the persons to whom she is promised, he to whom the first promise was made shall obtain her; and the other shall recover what he had given to the bride: but if the first bridegroom arrive when the second nuptials have been consummated, he shall receive back what he had given.*—KÁTYÁYANA.

Vyavasthá. **201.** If the bridegroom goes to a different country after having accepted a girl, she may, after the expiration of three seasons, take another bridegroom.—NÁRADA.†

Vyavasthá. **202.** If a man run away after agreeing to marry a girl, she should wait for three seasons, after the lapse of which she may marry another man.—NÁRADA.†

Vyavasthá. **203.** But should a bridegroom or husband die, naturally or civilly, after the ceremony of gift (*sampradána*), then, though the marriage was not perfected by the performance of the other rites, specially the stepping of seven steps,‡ a second marriage of such a girl is rarely in practice among the orthodox Hindús.

Although the author of the *Nirnoya-sindhu* says that without the performance of the sacrifice on fire (*homa*) and the other rites, a girl, though espoused, does not become a wife, and not being so, she may be given in marriage to another man, yet such is not the practice of the good,

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* Cited in the *Nirnoya-sindhu* and *Vivâda-bhangárnava*.—See *Coleb.* Dig., Vol. II, p. 491.

† Cited in the *Nirnoya-sindhu*, Chap. III.

‡ The next ceremony is the bride's stepping seven steps. It is the most material of all the nuptial rights; for the marriage is complete and irrevocable, so soon as she has taken the seventh step, and not sooner. She is conducted by the bridegroom, and directed by him to step successively into seven circles, while the following texts are uttered:—1. "May VISHNU cause thee," &c.—Part of Mr. Colebrooke's Essay on the Religious Ceremonies of the Hindús. See Asiatic Researches, Vol. VII, p. 303.

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who invariably act according to the ordinance of MANU as in the following texts:—"Once is the partition of an inheritance made; once is a damsel given in marriage; once does a man say 'I give:' these three are, by good men, done once for all, and are irrevocable. Let no man of sense, who has once given his daughter to a suitor, give her again to another; for he, who gives away his daughter whom he had before given, incurs the guilt and fine of speaking falsely in a cause concerning mankind. Neither ancients nor moderns, who were good men, have ever given a damsel in marriage, after she had been promised to another man".*

204. The marriage of widows is not in vogue amongst the orthodox, though now and then it is practised by persons who are not so. *Vyavasthá.*

Although the marriage of widows was ordained by the sage PARÁSARA, who is termed as the highest authority for the present (*Kali*) age, yet most of the other sages having considered it a censurable act, as being one by which the observance of the duty of continence and austerities is obstructed, and it being said in the *Áditya-purána* as well as in the *Vrihat Náradíya-purána* that these (parts of ancient law) have been abrogated by the wise legislators, as the cases arose in the beginning of the *Kali* age, and VYÁSA, the son of the very sage PARÁSARA, having declared the injunctions of the infallible legislators to be of equal authority with the holy writ (*Veda*),† the Hindú gentry still act in obedience to that prohibition. Remark.

205. There are eight forms of marriage:—1. *Bráhma*,—2. *Doiva*,—3. *Ársha*,—4. *Prájápatya*,— *Vyavasthá.*

Annotations.

204. Sir William Macnaghten says,—"Second marriages after the death of the husband's first espoused, are wholly unknown to the Hindú law,‡ though in practice, among inferior castes, nothing is so common." (1, 58) Such, however, is not the case: it is well known to the Hindú law, which treats of such marriage as having been in vogue in the other *Yugas*.

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* Chap. IX, *vs.* 47, 71, and 99.

† *Coleb.* Dig., Vol. III, pp. 141, 142.

‡ Not quite so: see the treatises on Widow Marriage written by Pandit Ishwar Chandra Vidyáságar.

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5. *Ásura*,—6. *Gándharva*,—7. *Rákshasa*, and—8. *Poishácha*.

They are thus described by—

Description of the different forms of marriage.

MANU :—"The gift of a daughter, clothed only with a single robe, to a man learned in the *Veda*, whom her father voluntarily invites and respectfully receives, is the nuptial rite called *Bráhma*. The rite, which sages call *Doiva*, is the gift of a daughter, whom her father has decked in gay attire, when the sacrifice is already begun, to the officiating priest who performs that act of religion. When the father gives his daughter away, after having received from the bridegroom one pair of kine, or two pairs, for uses prescribed by law, that marriage is termed *Ársha*. The nuptial rite called *Prájápatya* is, when the father gives away his daughter with due honor, saying distinctly: 'May both of you perform together your civil and religious duties.' When the bridegroom, having given as much wealth as he can afford to the father and paternal kinsmen and the damsel herself, takes her voluntarily as his bride, that marriage is named *Ásura*. The reciprocal connection of a youth and a damsel, with mutual desire, is the marriage denominated *Gándharva*, contracted for the purpose of amorous embraces and proceeding from sensual inclination. The seizure of a maiden by force from her house while she weeps and calls for assistance, after her kinsmen and friends have been slain in battle, or wounded, and their houses broken open, is the marriage styled *Rákshasa*. When the lover secretly embraces the damsel, either sleeping or flushed with strong liquor, or disordered in her intellect, that sinful marriage, called *Poishácha*, is the eighth and the basest.—Chap. III, *vs.* 27—34.

Ditto.

YÁJNAVALKYA :—In the *Bráhma* nuptials the damsel is given (by her father), when he has decked her as elegantly as he could, to the bridegroom, whom he has invited; in the *Doiva*, to the priest employed in performing the sacrifice;

Annotations.

205, Marriage has its appropriate forms. Eight are denominated:—the *Bráhma*, *Doiva*, *A'rsha*, *Prájápatya* (or *Káya*), *A'sura*, *Gándharva*, *Rákshasa* and *Poichácha*.—Stra. H. L., Vol. I, pp. 41, 42.

There are eight forms of marriage:—the *Bráhma*, *Doiva*, *A'rsha*, *Prájápatya*, *A'sura*, *Gándharva*, *Rákshasa*, and *Poishácha*. Macn. H. L., Vol. I, p. 59.

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in the *Ársha*, to the bridegroom, from whom he receives, (for religious purposes), a bull and a cow. When the father gives her to a suitor, saying, 'Perform all duties together,' the marriage is named *Káya* (or *Prájápatya*), and a son produced by it confers purity on himself and on six descendants in a male line; an *Ásura* marriage is contracted by receiving property from the bridegroom; a *Gándharva*, by reciprocal amorous agreement; a *Rákshasa*, by seizure in war; a *Poishácha*, by deceiving the damsel.*

206. Of these modes or forms, four, (*viz.*,)—the *Bráhma*,† *Doiva*, *Ársha*, and *Prájápatya*,—are legal for a *Bráhmana*: the marriage styled '*Gándharva*,' and the seizure of a maiden in war (*i. e.*, the *Rákshasa* marriage), are peculiar to *Kshatriyas*; the *Ásura* marriage is permitted for a *Voishya* and *Shúdra*; the *Poishácha*, forbidden to them, should be practised by no person whatsoever.—SHULAPÁNI. *Vyavasthá.*

YÁJNAVALKYA:—The first four are approved, in the case of a priest; the *Gándharva* and *Rákshasa* marriages are permitted for a soldier; the *Ásura* ceremony is peculiar to mercantile and servile men; the *Poishácha* marriage is reprobated for all.* **Authority.**

Annotations.

206. The four first forms are peculiar to the *Brahmanical* tribe. The principle in these contracts seems to be, that the parties are mutually consenting, and actuated by disinterested motives. The fifth form is peculiar to *Voishyas* and *Shúdras*. It is reprobated on the principle of its being a mercenary contract consented to by the father of the girl for a pecuniary consideration. The sixth and seventh forms are peculiar to the military tribe, where the union is founded either on reciprocal affection or the right of conquest. And the eighth or last is reprobated for all, being accomplished by means of fraud or circumvention.—Macn. H. L., Vol. I, pp. 59, 60.

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* *Vide Coleb.* Dig., Vol. III, p. 604.

† This form of marriage is called *Bráhma*, because it is peculiar to *Bráhmanas*, though at present it is practised by good men of all classes on account of its being the best of all forms. But this (which is ordained in *Shruti* and *Smriti*) must not be confounded with the form of marriage which is recently invented by *Bráhmas* or unitarians, and which is sometimes called *Bráhma* marriage by reason of its proceeding from, and belonging to, those *Bráhmas*.

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Remark. JAGAN-NÁTHA, however, has very justly said that at present the *Bráhma* nuptials only are practised by good men; but even the marriages called *Ásura*, *Gándharva*, *Ráksh-asa*, and the rest, are sometimes practised by others.—*Coleb.* Dig., Vol. III, p. 566.

Vyavasthá. **207.** The nuptial rites, which complete the marriage, are to be performed in each and every one of these forms of marriage.*

Vide Precedents, pages 393.

Annotations.

206. The most usual form of marriage is that of *Bráhma*, which is completed when the damsel is given by her father, when he has decked her as elegantly as he can, to the bridegroom he has invited, the nuptials of course being celebrated with the usual ceremonies. The next species of marriage most usually practised is that of *A'sura*, where a pecuniary consideration is received by the father.—Macn. H. L., Vol. I, p. 60.

206. Sir William Macnaghten further says:—"I am given to understand that marriages by the *Poishácha* mode are not uncommon; and that young women who from their wealth or beauty may be desirable objects, are, not unfrequently, inveigled by artifice into matrimony, the forms of which once gone through, the contract is not dissoluble on any plea of fraud, or even of force.—Macn. H. L., Vol. I, p. 60.

206. Of these, the four first, being approved ones, are proper for the Brahmin; the three next for the other classes; that is, the *Gándharva* and *Rákshasa* are permitted to the *Kshatriya* or military class, and the *A'sura* to the mercantile and the servile ones. Such is the usual distribution; though MANU,* as regarding the succession to the property of the woman, received at the time of her marriage in an unblamed form, adds the *Gándharva* to the four first.—Stra. H. L., Vol. I, p. 42.

207. The nuptial rites, accompanying them all,† have the effect of distinguishing even the less approved ones from commerce purely illicit, to which otherwise the *Gándharva* and *Rákshasa* ones might be assimilated.—Stra. H. L., Vol. I, p. 42.

207. Sir William Macnaghten, 'however,' says:—"The *Gándharva* marriage is the only one of the eight modes for the legalising of which no forms are necessary; and it seems that mutual

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* Chapter IX, *vachana* or verse 196.

† DEVALA, 3 Ding. 606.

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Authority.

YAMA (cited in the *Mádhavíya)* speaks in regard to gift with water in the *Gándharva* and other marriages,—"Neither by water nor words of mouth can a man be said to be the husband of a girl; he becomes her husband by the performance of the nuptial rites and by (the bride) stepping on the seventh step." So also DEVALA,—"The nuptial rites are ordained in the marriages styled the *Gándharva* and the rest; to this contract the nuptial fire must be made witness by men of the three classes.*"

Nuptial rites.

The nuptial rites are principally the *Nándí-mukha shráddha* performable on the day of gift, the gift of the bride to the bridegroom (*sampra-dána*) on that night, and, lastly, the *Kushandiká* which is enjoined to be performed within four days from date of the gift. In this, the bridegroom makes *homa* or oblation on fire,and, standing behind the bride, holds the palms of both hands open below those of the bride, who, in her palms joined and open, holds some *lájás* or parched paddy, and jointly with the bridegroom drops the same on the fire as an oblation; and during the recital of certain prayers the married pair walk hand in hand seven steps on seven circles made on the ground with white paint.†

Annotations.

co-habitation, as it implies what the law declares to be alone necessary, namely, 'reciprocal amorous agreement,' would be sufficient to establish such a marriage, if corroborated by any word or deed on the part of the man;" and in reference to this he alludes to a case, saying:—"On this principle the law officers of the Sudder Dewany Adawlut declared legal a marriage contracted in Cuttack, not very long ago, in a case where the parties had co-habited for some time, and the man signified his intention by placing a garland of flowers round the neck of the woman." It is, however, to be remarked that in the *Gándharva* form of marriage the only ceremony that may not be required to be performed is that of the gift, the exchange of the flower garland between the bridegroom and bride being expressive of the gift of the one to the other: but the ceremony of *homa* should certainly be performed, as otherwise the marriage is not complete.

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* *Nirnoya-sindhu*, Chap. III, Sect. i, Leaf 37. *Vide Coleb.* Dig., Vol. II, page 606.

† The marriage ceremonies in detail will be found in Mr. Colebrooke's Essay on the Religious Ceremonies of the Hindús. See Asiatic Researches, Vol. VII, pp. 288—311.

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In the *Gándharva, Ásura, Poishácha,* and *Rákhsha* mariages, co-habitation first takes place, then *homas* or sacrifices on fire are performed as ordained.—*Nirnoya-sindhu,* Chap. III, Sect. i, Leaf 33.

SECTION III.

On Persons competent to give a Girl in Marriage.

Vyavasthá. **208.** A father, paternal grandfather, brother, *sakulya,** maternal grandfather, maternal uncle, and mother, if not insane, degraded, or the like, are competent to perform the ceremony of the gift of a bride to her bridegroom; the right of giving a girl in marriage devolves successively; so that on failure of the first, the next in order is entitled to conduct the ceremony.—See *Udváha-tattwa,* page 70.

Authority. YÁJNAVALKYA :—A father, paternal grandfather, brother, *sakulya,** and natural mother are the givers of a damsel (in marriage) : in default of the first the next in order, provided they be in the natural state (*a*).—*Udváha-tattwa* p. 70.

Explanation. *(a)* "In the natural state"—that is, not insane, degraded, or the like. What is done by a father or the like, when not in the natural state, is certainly null. That is declared by NÁRADA: "What is done by one, when not in his natural state, though he was independent, must be (held) as not done by reason of his not being (then) independent." A person, though independent by reason of his being a father or the like, becomes dependent in consequence of his not being in the natural state: then (that is, in that state) the acts of betrothment, &c., performed by him must be (held) as not done.—*Ibid.*

Authority. VISHNU :—A father, paternal grandfather, brother, *sakulya,** maternal grandfather, and mother are the givers of a damsel (in marriage); in default of the first, the next in order, provided they be in the natural state.—*Ibid.*

Authority. NÁRADA :—The father himself will give the daughter (in marriage), or her brother by the father's consent, the maternal grandfather, the maternal uncle, the *sakulya,**

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* By the term *Sakulya* is here meant relations of the same race as far as the tenth degree of the affinity, as expounded in the following text cited in the *Shuddhi-tattwa.*—"*Sakulya* (is any of the) relations as far as the tenth degree."

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and *bándhava* (*b*), the mother in default of all (these), provided she be of sound understanding, otherwise the kinsmen (of the mother's father) will give the daughter in marriage.—*Ibid.*

(*b*) By '*bándhava*' is here meant 'paternal grandfather,' to coincide with the (above) text of VISHNU.—*Ibid.*

RAGHU-NANDANA :—The maternal uncle must be understood to be before the mother; and the order of the *sakulya* and paternal grandfather, as stated by NÁRADA, is not to be respected, but that prescribed by VISHNU and YÁJNAVALKYA is to be followed in practice.—*Ibid.* Conclusion.

209. Every father *(c)* is bound to give his daughter in marriage at the proper time *(d)*; he that does not, is reprehensible, nay punishable for the fault. *Vyavasthá.*

VRIHASPATI :—The father (*c*) who gives not (his daughter in marriage) at the proper season (*d*), the husband who approaches not (his wife) in due season, and the son who gives not support to his mother, are criminals, and shall be punished according to the law.—*Coleb.* Dig., Vol. II, p. 386. Authority.

MANU :—Reprehensible is the father (*c*) who gives not his daughter in marriage at the proper time (*d*), and the husband who approaches not his wife in due season, reprehensible also is the son who protects not his mother after the death of her lord.—Ch. IX, *v.* 4. Authority.

(*c*) Here the term 'father' comprehends also the girl's mother and the heirs of the father, inasmuch as they also are bound to give her in marriage.—See *ante*, pp. 139—144. Explanation.

(*d*) 'At the proper time or season'—that is, before the appearance of her menses; for a text of GOUTAMA ordains that a girl should be given in marriage before her menses have appeared.—KULLÚKA BHATTA. Explanation.

Annotations.

209. To select a suitable husband for his daughter, at an age when she can have but very little ideas of the object, every Hindú father is expressly bound; failing whom, the duty is incumbent on a succession of paternal relations, and finally on the mother,—Stra. H. L. Vol, I, p. 36.

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Authority. VASHISHTHA :—So many seasons of menstruation as overtake a maiden feeling the passion of love and sought in marriage by persons of suitable rank, even so many are the beings destroyed by both her father and her mother: this is a maxim of the law.*

Authority. POITHÍNASHI :—A damsel should be given in marriage, before her breasts swell. But, if she have menstruated (before marriage), both the giver and the taker fall to the abyss of hell; and her father, grandfather and great-grandfather are born (insects) in ordure. Therefore she should be given in marriage while she is yet a girl.*

Authority. YAMA :—If a girl twelve years old remains at home unmarried, her father commits the sin of killing a *Bráhmana*: (in that case) such damsel should choose a bridegroom for herself.†

Authority. YAMA :—A man, therefore, should dispose of the hand of his daughter before the appearance of her menses.†

Vyavasthá. **210.** The time for giving a girl in marriage is from the sixth year of her age to the period previous to the appearance of her menses.

Authority. *Paráshara Mádhavíya*:—It, (*i.e.* marriage) is laudable (in the case of its taking place) after the fifth year from birth or from conception (of the girl).—*Nirnoya-sindhu.*, Chap. III, Sect. i, Leaf 32.

Authority. *Bhárata* :—Let the father once for all give (his) daughter in marriage before the appearance of her menses.—*Ibid.*

Authority. Amongst all classes, the marriage of a girl, O king! is laudable, if it takes place after the seventh year (of her age), and reprehensible (if it takes place) at any other period.—*Ibid.*

"But the wise consider the marriage (of a girl) in the eighth year of her age to be laudable."—Although according to this text of SAMVARTA, and also according to this—"after that she is with menses,"‡ and the like texts, the

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* See *Dá. Bhá.*, Chap. XI, Sect. ii, § 6. See *Coleb.* Dig., Vol. II, p. 387.

† Cited also in the *Nirnoya-sindhu*, Chap. III, Sect. i, Leaves 31, 32.

‡ The whole of this text is as follows:—"A girl eight years old is (termed) '*Gouri*,' and one nine years old is '*Rohini*,' in the tenth year of her age she is called '*Kanayká*,' after that she is with menses (*Rajaswalá*)."

Most of the females of this country begin to menstruate after the twelfth or at the thirteenth year of their age.—See *Medical Transactions*, Vol. XI, Part I, pp. 308, 309.

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marriage (of a girl) is prohibited (after the tenth year) of her age), yet it must be known that in default of a giver, the marriage should be put off to the twelfth or (even) to the sixteenth year (of her age): for it is declared by BOUDHÁYANA (cited in the *Paráshara Mádhaviya*), that a damsel with menses should remain under the control of her father.—*Ibid.*

211. But if a bridegroom endowed with learning and good qualities is not to be had, she may be kept unmarried till her death. *Vyavasthá.*

MANU:—To an excellent and handsome youth of the same class, let every man give his daughter in marriage according to law, even though she have not attained her age (of eight years). But it is better that the damsel, though marriageable, should stay at home till her death, than that he should ever give her in marriage to a bridegroom void of excellent qualities (*d*).—Ch. IX, *vs.* 88, 89. Authority.

(*d*) Even after the appearance of her menses, a girl should stay at her father's house till her death, yet she should never be given in marriage by her father to a man destitute of learning and good qualities.—KULLÚKA BHATTA. Explanation.

212. If the person competent to dispose of a girl in marriage do not dispose of her hand at the proper time, she should wait for three years from the time of the first appearance of her menses; after that, she is at liberty to choose a bridegrom for herself; and by such act neither she nor her husband would commit an offence. *Vyavasthá.*

MANU:—Three years let a damsel wait, though she be marriageable; but, after that time, let her choose for herself a bridegroom of equal rank (*e*).—If, not being given in marriage, she choose her bridegroom, neither she nor the youth chosen commits any offence.—Ch. IX, *vs.* 90, 91. Authority.

Annotations.

211, 212. To select a suitable husband for a daughter, at an age when she can have but very imperfect ideas of the object, every Hindú father is expressly bound; failing which, the duty is incumbent on a succession of paternal relations, and finally on the mother, which having been neglected, to the prejudice of the girl, for three years from the time that she becomes marriageable, she is at liberty to choose for herself.—Stra. H. L. Vol. I, p. 36.

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Explanation. *(e)* After the lapse of three years if she do not get a bridegroom endued with superior qualities, she should for herself choose a bridegroom equal in class and qualities.—KULLÚKA BHATTA's Commentary on the above texts.

Vyavasthá. **213.** If there be none competent to dispose of her in marriage, when she arrives at the marriageable age, then let the girl choose for herself a suitable bridegroom, or apply to the ruling power for the purpose.

Authority. YÁJNAVALKYA:—If there be no person (competent) to give her in marriage, let the damsel herself choose a (suitable) bridegroom.—Cited in *Mitákshará Áchárádhyáya,* Leaf 12;—*Nirnoya-sindhu,* Chap. III, Sect. i, Leaf 32. See *Coleb.* Dig., Vol. II, p. 387.

Authority. MANU:—If there be none (to give her in marriage), let the girl repair to the ruling power.—Cited in the *Nirnoya-shindhu,* Chap. III, Sect. i, Leaf 32.

Reason. The reason why, under the above circumstances, such liberty is granted by law to a female is that, her obligation to marry is amongst the ordinances of the *Veda,* and that marriage is the principal sacrament ordained with regard to her person as being in lieu of the regenerating ceremony, *upa-nayana,* and completely expiatory of the sinful taint that every child contracts in the mother's womb, without which she remains impure.—See *ante,* pp. 153, 154.

Time for marriage. The proper time for the marriage of a *Bráhmana* (and therefore of any twice-born man) is the second quarter of his life, that is from the 26th to the 50th year of his age; or earlier if he can finish his studentship before that time, and his duties of the order of *grihí* be otherwise impeded. Thus MANU:—"Let a *Bráhmana,* having dwelt with a preceptor during the first quarter of a man's life, pass the second quarter of human life in his own house, when he has contracted a legal marriage."—"A man, aged thirty years, may marry a girl of twelve, if *he find one* dear to his heart; or a man of twenty-four years, a damsel of eight: but, if *he finish his studentship earlier, and* the duties of his next order would otherwise be impeded, let him marry immediately."* But now as the youths of the twice-born or regenerate classes do not generally embrace the order of *Brahmachárí* and study the *Vedas* so long as the 25th year of their age in the house of their preceptors, they contract marriages at any time after their *upa-nayana* or ligation of

* MANU, Chap. IV, *v.* 1, and Chap. IX, *v.* 94.

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the sacred thread. The practice among the good *Shúdras* is to marry their male children after the ceremony of boring their ears (*Karna-vedha*).

With respect to the comparative ages of the bride and bridegroom, although MANU has said,—"A man, aged thirty years, may marry a girl of twelve, if *he find one* dear to his heart; or a man of twenty-four years, a damsel of eight: but if *he finish his studentship earlier, and* the duties of his next order would otherwise be impeded, let him marry immediately;"—yet in the present (*kali*) age, (in which, as already stated, the youths of the regenerate classes do not generally embrace the order of *Brahmachárí* and study the *Vedas* so long as the 25th year of their age), the practice is not exactly the same as above, but only *this* that the bride should be younger than her bridegroom.

The above practice conforms to the text of YÁJNAVALKYA, cited at page 176.

SECTION IV.

WHO ARE, OR ARE NOT, COMPETENT TO MARRY.

All who are qualified to inherit are (with a very few exceptions) competent to marry or to be married. As respects the persons disqualified to inherit,* many of them, if not all, were, in other ages, allowed to be married. Thus MANU:—"Eunuchs, and outcasts, persons born blind or deaf, mad men, idiots, the dumb, and such as have lost the use of a limb, are excluded from a share of the heritage. If the eunuch and the rest should at any time desire to marry, *and if the wife of the eunuch should raise up a son to him by a man legally appointed, that son, and* the issue of such as have children, shall be capable of inheriting."† The object of eunuchs and persons unable to beget children being married, was to get *kshetraja*‡ sons by appointment, that is, by allowing their wives to raise up issue to them by men legally appointed; but as in the present (*kali*) age the law to raise up issue by appointment has been abrogated, and as save and except the *ourasa* and *dattaka*, the other descriptions of sons (*viz.*, the *kshetraja* and the rest) are prohibited to be made,§ the marriage of eunuchs and the like

* See the Chapter on Exclusion from Inheritance.

† Chapter IX, vs. 201, 203.

‡ '*Kshetraja*' etymologically or literally signifies 'born in the field,' whence 'born of a wife', that is, the son begotten on her by a kinsman or another person appointed for the purpose.—See the Book on Adoption.

§ See the Book on Adoption.

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must also be taken to have been abrogated, according to the maxim—"*Cessante ratione, cessat ipsa lex.*"* Of the other disqualified persons, those who are totally bereft of reason or otherwise unable to utter the marital *Mantras*,† for accepting the gift of their brides, should also be held incompetent to marry. So *now* only those of the disqualified persons who are blind, lame, or the like (not bereft of reason), are competent to marry; and there exists also the practice (not forbidden in the *Veda*) of their marrying.

Minors, male and female, though by themselves incompetent to enter into matrimonial contracts, are allowed to be married through the agency, or with the consent, of their guardians or relations, who by law are empowered to give them in marriage, and perform the ceremonies thereof, directly or by delegation,‡ but even if a minor be married without the consent of his or her guardian, still such marriage will not be dissoluble or vitiated, on that ground, because the nuptial ceremonies once properly gone through, render the marriage valid and binding to all intents and purposes.§

As respects females, they are, under any circumstance, competent to marry, or to be given in marriage, inasmuch as marriage of a female is the gift of herself to her bridegroom, and this may be made by a competent person notwithstanding that she is deformed in body, diseased or mentally disordered, provided the donee would accept such gift. In the religious point of view, marriage being the only initiatory ceremony for a woman, she must be initiated in the same, as otherwise her person cannot become purified and perfected by the removal of the seminal and uterine taints.¶ The law, moreover, says that, should an adult girl remain unmarried, the offence of destroying an embryo is incurred as often as her courses recur in that state.‖ In the worldly point of view also, an adult girl must, under any circumstance, be married, or given in marriage, as otherwise the family would be disgraced and degraded in society, and still more so if she continue menstruating in that state. No sooner a girl passes the tenth year of her age, than she is declared to be "*arakshaníyá*," that is, not to be kept any longer unmarried; and she is declared to be so, because it is in *that* year of her age that the menstrual blood is created in her.**

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* निमित्तस्यापाये, नैमित्तिकस्याप्यपायः ।

† See Colebrooke's Essay on the Religious Ceremonies of the Hindús, Asiatic Researches Vol, VII, pp 288—311.

‡ See *ante*, pp. 166, 167, and Precedents, pp. 383—391.

§ See Macn. H. L., Vol. I, page 60. *Ante*, p. 164.

¶ See *ante*, pages 153, 154.

‖ See *ante*, page 168.

** See *ante*, page 168, Note.

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SECTION V.

On the Persons between whom intermarriage is allowed or prohibited.

214. In the present (*kali*) age, a man can marry a girl from his own caste, and not from a different caste. *Vyavasthá.*

Vide Precedents, pages 394—397.

In ages, other than the *kali*, men of the regenerate classes were allowed to marry women of a lower caste or castes as well as those of their own castes. Thus Manu:—"A *Shúdrá* woman only must be the wife of a *Shúdra;* she and a *Voishyá*, of a *Voishya;* they two and a *Kshatriyá*, of a *Kshatriya*; and they (three) and a *Bráhmaní*, of a *Bráhmana.*"—Chap. III, *v.* 13. Authority.

The marriage of a *Shúdra* with a woman of another caste has been prohibited in all ages; Thus Manu himself:—"For a *Shúdra* is ordained a wife of his own class, and no other: all produced by her shall have equal shares, though she have a hundred sons."—Ch. IX, *v.* 157. Authority.

But marriage from a different caste has been prohibited by the wise legislators at the beginning of the *kali* age, as will appear from the following passages:—

"Undertaking sea voyages (to circumnavigate the ocean), the carrying of a *kamandalu* (by a householder), the marriage of twice-born men with damsels unequal in class;" premising these and other practices, the *Vrihat Náradíya-purána* adds,—"the wise have declared that these practices must be avoided in the *kali* age."* Authority.

Annotations.

214. The old law permitted men of higher tribes to marry in tribes so far below. * * * But it is unnecessary to dwell upon these distinctions, the practice of such intermarriages being considered to have been prohibited from the commencement of the present (the *kali*) age, since when equality of tribe has been ever, as it continues to be, in the strictest sense, essential to a legal marriage. * * * But, though the class must be the same, the parties must be of distinct and unconnected families.—Stra. H. L., Vol. I, pp. 39, 40.

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* See *Udváha-tattwa*, and *Coleb.* Dig., Vol. III, pp. 141, 142, & 272. See also the General Note appended by Sir William Jones to his translation of Manu, page 364.

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Authority.

The *Áditya-purána* too—"The filiation of any but *datta* and *ourasa* sons is not admitted: the marriage of twice-born men with damsels not of the same class:" premising these and other parts of law, proceeds,—"These (parts of ancient law) were abrogated by wise legislators, as the cases arose at the beginning of the *kali* age, with intent to secure mankind from evil." "The injunctions of infallible legislators (*a*) are of equal authority with the holy writ (*Veda*)."—*Coleb.* Dig., Vol. III, p. 142.

(*a*) 'Infallible legislators' are such as are free from all defects.—*Ibid.*

Vyavasthá.

215. It is prohibited to contract marriage with a girl who is the father's *sapinda* (*b*), or of the same *gotra* (*c*),* or of equal *pravara* (*d*) with himself, or who is a *sapinda* or *samánodaka* (*e*) of his maternal grandfather.

Sapinda defined.

(*b*) A *sapinda* is a relation within the sixth degree from one's self not inclusive, as defined in the following text: "The fourth person and the (two) rest share *lepa* or the remains of the oblation wiped off with *kusha* grass; the father and the (two) rest share the oblation cakes; the seventh person is the giver of oblations; the relation of *sapindas* or persons connected by the oblation cake extends therefore to the seventh person (or sixth degree of ascent or descent.) See *Coleb.* Dig., Vol. III, page 531. See also the definition of the *sapinda* related by the oblation of food, and that by consanguinity, in the Book on Adoption.

Gotra defined.

(*c*) *Gotra* is the race (or family name) of an ancient sage, whose name, converted into an adjective, is, as an epithet, prefixed to the word *gotra* to distinguish his *gotra* from that of another sage; thus the *gotra* of the sage *Kashyapa* is called '*Káshyapa-gotra.*' A person of the same *gotra* is a relation of the same race, or one descended in the direct male line from the same primitive stock or sage.*

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* There are twenty-four *gotras;* thus MANU:—*Shándilya, Káshyapa Vátsya, Sávarnaka, Bharadwája. Goutama, Soukálina, Kalkisha, Agniveshya Krishnátreya, Vashishthaka, Vishwámitra, Kushika, Koushika, Ghrita-koushika, Moudgalya, A'lamyána, Paráshara, Soupáyana, Atri, Vásuki, Rohita, Boiyághra-padyaka, Jámadagnya:* (these are) the twenty-four *gotras* mentioned by the ancient sages.

Again MANU:—*Jamadagni, Bharadwája, Bishwámittra, Atri, Goutama, Vashishtha, Kashyapa,* and *Agastya* are the sages who are founders of *gotras.* Those who are the offspring of these are known to be (of their) *gotras.*

The above is (but) illustrative, inasmuch as *gotras* of others (*i. e.*, other sages) also are seen.

The sages—*Soukálinaka, Moudgalya, Paráshara, Vrihaspati, Kánchana, Vishnu, Koushikya, Kátyáyana, A'treya, Kánwaka, Krishnátreya, Sánkriti,*

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(d) Pravara is one of the principal sages of a *gotra* or race by whom that race is distinguished from the rest. For instance in the *gotra* denominated *Káshyapa* (*i. e.*, of *Kashyapa*) there are three *Pravaras*, namely, *Kashyapa*, *Avatsára*, and *Noidhruva*, of whom *Kashyapa* is the founder of that *gotra*, which is distinguished from other *gotras* by having for its *pravaras* the sages *Avatsára* and *Noidhruva*, who characterise the same. Explanation.

'Of equal *Pravaras*,' that is, descended from a *gotra* which has *pravaras* of the same number and names. Explanation.

The *gotras* and *pravaras* of the *Kshatriyas* and *Voishyas* are the same as those of their priests (*purohits*).—*Nir. Sindh.* Chap. III, Sect. i, p. 30. Explanation.

The *gotras* and *pravaras* of the different *Shúdra* families also are the same as those of the learned *Bráhmanas* who (primitively) acted as their priests (*purohits*). Thus the *Agnipurána*, in the Chapter entitled 'The *Varna-sankara Upákhyána*:'—"*The gotras, Pravaras* and the like of the *Kshatriyas, Voishyas*, and *Shúdras*, as also of the mixed castes (*Varna-sankaras*), are the same as those of the learned *Bráhmanas* who acted as their priests."—See the word *Gotra* in the *Shabda-kalpadruma*. Explanation.

(*e*) '*Samánodakas*' are kindred connected by libations of water. —See *ante*, pages 106, 107. Explanation.

It should be known that among all the classes the relation of *sapindas* or persons connected by the oblation-cake extends to the seventh generation, after which is the relation of *Samánodakas*.—A text of *Brahma-purána* cited in the *Suddhi-viveka* and *Suddhi-chintámani*.—*Nir. Sindh.*, Chap. III, Sect. i, p. 23. Explanation.

MANU and SÁTÁTAPA:—She who is not descended from (his) maternal (or paternal) ancestors within the sixth degree, and who is not (known by her family name to be) of the same primitive stock (*gotra*) with his father (or mother), is eligible by a twice-born man for nuptials and holy union.—See MANU, Ch. III., *v.* 5. Authority.

The relation of *sapinda* extends as far as the seventh degree, as said in the following text:—"The relation of *sapindas* or kindred connected by a common oblation ceases with the seventh person." Consequently the meaning is that, whatever female is Interpretation and exposition.

Koundilya, Garga and *A'ngirasa, Anávrikákhya, Arya, Joimini Vriddyákhya, Shándilya, Vátsya, Sávarnya, A'ltamyána, Voiyághra-padya, Ghrita-Koushika Shaktri, Kánwáyana, Vásuki, Goutama, Shunaka* and *Soupáyan* are (also) founders of *gotras*.

They who are descendants of these are known to be (of their) *gotras*. In all, there are forty-two *gotras*.—The *Dharma-Pradípa* of *Dhananjoyo* quoted in the *Kula-dípikú*.—See *Shabda-kalpadruma*.

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descended from the race of one's maternal grandfather and the rest (is not to be married by him.) By the word '*cha*,' (and, also,) it is meant that one who is of the maternal grandfather's *gotra* and known by birth and the family name* to be descended from one's mother's lineage is not also to be taken in marriage; others, though from the same primitive stock as the mother (*i. e.* maternal grandfather), are eligible for marriage. This is the conclusion.—KULLÚKA BHATTA.

Authority. So says VYÁSA:—Some do not hold that marriage should be contracted with a damsel of the mother's (*i. e.*, maternal grandfather's) *gotra:* one, however, may, without hesitation, marry a girl of the same *gotra*, if she be not known by birth and family name* (that is, if she be not a *samánodaka*). Cited by KULÚKA BHATTA. See *Udváha-tattwa.*

Authority. *Udváha-tattwa*:—Marriage must not also be contracted with a damsel connected by an equal or common libation of water (*Samánodaka*) with the maternal grandfather.

Authority. YÁJNAVALKYA:—"After the fifth from the mother and seventh from the father." To this should be added, "the relation of a *sapinda* ceases."†

Authority. YÁJNAVALKYA:—Let the man, who has unobstructedly finished his career of life as a *Bráhmachári*, marry a damsel, who is endowed with good qualities, amiable, younger in age, not diseased, nor without a brother, not previously married to another man, and neither a *sapinda*, nor of the same *gotra* and *pravaras* with himself.†

Authority. In the Digest of VISHWARÚPA:—The girl who is beyond the seventh of the father's kindred (*bandhu*), or beyond the fifth of the mother's kindred, should alone be taken in marriage in the above manner.†

Authority. As to what is said by VASHISHTHA, *viz.*, "The fifth and the seventh (respectively) from the mother and father," and that in the *Vishnu-purána, viz.*, "Let a *grihastha*, O king! properly and legally marry a girl who is the fifth on the mother's side or seventh on the father's side,"—that must be interpreted as being *beyond* the fifth and seventh degrees.†

Conclusion. Therefore, let a man marry a girl who is beyond the fifth on the mother's side, or the seventh on the father's.—This is the demonstrated decision or conclusion.† Consequently,—

* By the phrase "known by birth and the family name" is meant one within the relation of *samánodaka*. Thus VRIHAT MANU: 'The relation of *samánodakas* are those connected by an equal or common libation of water, extends to the fourteenth degree: or, as some affirm, (it reaches) as far as memory of birth and name extends.—See *Mitákh.*, Chap. II, Sect. v, p. 6.

† *Nirnoya-Sindhu*, Chap. III, Sect. i, pp. 22—25. See *Udváha-tattwa.*

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Vyavasthá.

216. The female descendants within the seventh degree (inclusive) from the father, paternal grandfather, and the rest; and the female descendants as far as the fifth degree (inclusive) from the maternal grandfather and the rest; also the female descendants within the seventh degree (inclusive) from the father's friends (*bandhus*), and their six ancestors, through whom those females are related, and also the female descendants as far as the fifth degree (inclusive) from the mother's friends, and their four ancestors, through whom they are related, are not to be taken in marriage.*—*Udváha-tattwa.*

Annotations.

216. Here the calculation should be made commencing with the common ancestor. This is (said as follows) :—'If the father of the bride or bridegroom be the seventh, or if their mother be the fifth, from the common ancestor, then ceases their relation of *sapinda.*—*Nirnaya-sindhu*, Chap. III, Sect. i, leaf 23.

216. Here the expression "fifth and seventh from the friends" being used, one should leave also the girl who is the seventh from the paternal grandfather's sister's son or fifth from the maternal grandfather's sister's son ;—and it should be known that this also is to be done in the case of other friends.—*Ibid.*

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* These may be illustrated as follows :—

The sons of a person's father's paternal aunt (father's sister), the sons of his or her father's maternal aunt (mother's sister), and the sons of his or her father's maternal uncle (mother's brother), are his or her father's *bandhus.*—From each of these *bandhus* (inclusive) are enumerated seven degrees in ascent from whom relationship is derived, thus :—1, The son of a person's father's paternal aunt,—2, that son's mother,—3, maternal grandfather,—4, maternal great-grandfather,—5. maternal great-great-grandfather,—6, the latter's father and—7, paternal grandfather. In like manner,—1, the son of a person's father's maternal aunt,—2, that son's mother,—3, maternal grandfather—4, maternal great-grandfather,—5, maternal great-great-grandfather,—6, the latter's father, and—7, paternal grandfather.—1. The son of one's father's maternal uncle,—2, that son's father,—3, paternal grandfather,—4, paternal great-grandfather,—5, paternal great-great-grandfather,—6, the latter's father, and—7, paternal grandfather. The female descendants, as far as the seventh degree of and from each of the above enumerated persons, are not to be taken in marriage.

The sons of a person's mother's paternal aunt, the sons of his or her mother's maternal aunt, and the sons of his or her mother's maternal uncle, are his or her mother's *bandhus.* From each of these *bandhus* (inclusive) five ascendant degrees, from whom relationship is derived, are enumerated as follows :—1, the mother's paternal aunt's son,—2, his mother (*i. e.* the mother's paternal aunt,)—3, his maternal grandfather,—4, maternal great-grandfather, and—5, the maternal great-great-grandfather. In like manner,—

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The bridegroom and bride must be counted by the wise from that common ancestor (inclusive), whose descendants separated in branches, (*i. e.*, from whom branches of the family have issued).—A text cited in the *Udváha-tattwa.*

Direction. In counting from a (father's or mother's) friend, those male ancestors (only) must be enumerated whose descendants separated in branches; and not the female ancestors, such as the maternal grandmother, paternal grandmother, and the rest, except the mother's aunts and father's aunts; for, in the text of NÁRADA—"Girls descended from the father's and mother's friends are not to be taken in marriage as far as the seventh and fifth degrees respectively"—the adjectives (seventh and fifth) are used in the masculine gender.—*Udváha-tattwa.* Such is also the doctrine of the *Viváha-tattwárnava.*—See the foot-note in the preceding page.

Authority. *Vishnu Sútra :*—One must not marry a girl of the same *gotra* or *pravaras,* or, as far as the fifth in degree, from the mother, or seventh from the father.—Cited in the *Udváha-tattwa.*

Remark. Although the term twice-born being used in the above text of MANU and SÁTÁTAPA* and in some other texts, it might be implied that *Shúdras* are excluded from being bound to avoid marriage with girls related to them as *sapindas* or *samánodakas,* as well as with those who are of the same *gotra* as they; yet this is not the case. *Shúdras* are exempted from being bound to marry girls of the same *gotra,* because they have no *gotras* of their own ancestors† (but of their own *purohits* or priests); whereas there exist the relations of *sapinda* and *samánodaka* amongst the persons of each caste or sub-caste of the *Shúdras,* in the same manner as amongst the members of each caste or sub-caste of twice-born men. Consequently,—

1, the mother's maternal aunt's son,—2, his mother (*i. e.*, the mother's maternal aunt,)—3, his maternal grandfather,—4, maternal great-grandfather, and—5, maternal great-great-grandfather.—1, The mother's maternal uncle's son,—2, that son's father,—3, paternal grandfather,—4, paternal great-grandfather, and—5, paternal great-great-grandfather. The female descendants as far as the fifth degree of and from each of the above enumerated persons are not to be taken in marriage.

* Cited at page 175.

† The sons of MARÍCHI, and of all other *Rishis,* who were the offspring of MANU, son of BRAHMÁ, are called the companies of *Pitris,* or forefathers.—The *Somasads,* who sprung from VIRÁJ, are declared to be the ancestors of the *Sádhyas;* and the *Agnishwáittás,* who are famed among created beings as the children of MARÍCHI, to be the progenitors of the *Devas.*—Of the *Doityas,* the *Dánavas,* the *Yakshas,* the *Gandharvas,* the *Uragas,* or *Serpents,* the *Rákshashas,* the *Garudas,* and the *Kinnaras,* the ancestors are *Barhishads* descended from ATRI ;—Of *Bráhmanas,* those named *Somapas;* of *Kshatriyas,* the *Havishmats*; of *Voishyas,* those called *A'jyapas;* of *Shúdras,* the *Sukálins* :—The *Somapas* descended from me, BHRIGU ; the *Havishmats,* from ANGIRAS ; the *A'jyapas,* from PULASTTA ; the *Sukálins,* from VASHISHTHA.—MANU, Chap. III, *vs.* 194—198.

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217. A *Shúdra*, equally with a man of any other class, is bound to avoid marrying a girl related to him as a *sapinda* or *samánodaka*. Such also is the practice of the good. *Vyavasthá.*

But the relation of *sapinda* and *samánodaka* exists, without difference, amongst the *Shúdras*, as otherwise the *sapinda* relation in regard to marriage considered to be common in the text of NÁRADA, cited by HARI-NÁTHA UPÁDHYÁYA—(*viz.*, "The relation of *sapinda* ceases beyond the fifth and seventh degrees, respectively, from the mother and father: this is the rule among *all* the classes),"—would be meaningless or useless.—See *Udváha-tattwa*. See also the subjoined text. Authority.

DEVALA:—The relation of *sapinda* ceases after the fifth and seventh degrees, respectively, from the mother and father. This is the rule in *all* the classes.—Cited in the *Háralatá*. See *Nir. Sindh.*, Chap. III, Sect. i, leaf 26. Authority.

BOUDHÁYANA:—He who inadvertently marries a girl who is a *sapinda*, or sprung from the same original stock (*gotra*) with himself, must support her as a mother.—*Nir. Sindh.*, Chap. III, Sect. i, leaf 30. See Coleb. Dig., Vol. III, page 329. Authority.

SUMANTU cited in the *Sambandha-tattwa*:—He who marries a daughter of his father's or of his mother's sister, or of his maternal-uncle, or a girl sprung from the same primitive stock (*gotra*) with his mother, or descended from the same ancient sage (with his father), must perform *chándráyana* (*a*) or the lunar penance, and divorcing that wife, he must support her as his mother.—*Nir. Sindh.*, Authority.

Annotations.

217. Sir Thomas Strange says:—"The marriage of a *Shúdra*, indeed, with a woman of the same primitive stock, is allowed;* and the son born of such marriage is of course capable of inheriting. But among the other castes, a woman, to be in this respect eligible, must not be descended from the paternal or maternal ancestors of her proposed husband, within the sixth degree."—Stra., H. L., Vol. I, p. 41. But this is defective as well as inaccurate.

* Because the primitive stock, that is *gotra*, of the *Shúdra* families is the same as that of their *purohits* or *gurus* (priests or spiritual guides) and therefore not by race or consanguinity.

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Chap. III, Sect. i, leaf 26.—See *Coleb.* Dig., Vol. III, page 329.

Authority. A *Bráhmana* who marries a damsel of his own *gotra* and *provaras*, ceases to be a *Bráhmana*, and the son born of that wedlock is a *chandála*.—*Udváha-tattwa.*

Authority. MEDHÁTITHI has, in the name of VASHISHTHA, cited the subjoined text which prohibits marriage with a girl who is of the mother's *gotra* :—"If a twice-born man marry a girl of the same *gotra* or of the same *pravaras*, or a maternal uncle's daughter, or a girl of the mother's *gotra*, he should perform the *chándráyana* (*a*) or lunar penance, after having entirely deserted her." But this text also relates to the case of a girl not known by birth and descent to be of the mother's (*i. e.*, the maternal grandfather's) race.—KULLÚKA-BHATTA.

Explanation. (*a*) *Chándráyana* is a religious or expiatory observance regulated by the moon's age, diminishing the daily consumption of food every day, by one mouthful, for the dark half of the month beginning with the fifteenth or the full moon, until it is reduced to one, at the new moon, and increasing it in like manner during the fortnight of the moon's increase. There are other forms of this penance.

Explanation. *Chándráyana* is thus described by MANU :—"If he diminish his food by one mouthful *each day* during the dark fortnight, *eating fifteen mouthfuls on the day of the opposition*, and increase it *in the same proportion*, during the bright fortnight, *fasting entirely on the conjunction*, and perform an ablution regularly at sunrise, noon, and sunset—this is the *Chándráyana*, or the lunar penance.—Chap. XI, *v.* 217.

Exceptions to the above rules :—

SHÁKATÁYANA says :—"One should marry a girl not related within the seventh degree; if such girl be not procurable, then a girl of the seventh degree; in her default, one of the fifth degree: this is the rule on the father's side. A girl related in the seventh, sixth, fifth, third, or fourth degree on either side may be taken in marriage without an offence being committed."*

Vyavasthá. **218.** A girl beyond the seventh degree in relationship is preferable (to one of a nearer degree,) because the text cited, says :—"If a girl beyond the seventh degree be not procurable, a man may marry a girl of the seventh degree ; in like manner, a girl beyond the fifth degree (on the mother's

* Cited in the Commentary on the *Dattaka-mímánsá*, Sana., p. 24.

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side) is preferable for marriage, because it is laid down in the above text that a girl beyond the fifth degree not being procurable, one may marry a girl of the fifth degree: such is the exceptional rule to be adopted on both sides according to all opinions."—*Keshava Voijoyanti.**

219. A girl, who is beyond three *gotras* from the bridegroom, is not unmarriageable, though she be one related within the seven or five degrees as above stated. *Vyavasthá.*

For instance, should the paternal great-grandfather of the man who is to marry, be of the *Káshyapa gotra*, his daughter be of the *Shándilya gotra*, and her daughter be of the *Vátsya gotra*, and her daughter, of the *Sávarna gotra*, then the latter's unmarried daughter, who being of the *Sávarna gotra* is beyond three *gotras*, namely, the *Káshyapa*, *Sándilya*, and *Vátsya*, may be taken in marriage by the man of the *Káshyapa gotra*. Illustration.

VRIHAT MANU:—She who is not connected with the mother by the oblation cake and libation of water, may be taken in marriage by a twice-born man, and also she who (though related) is not within three *gotras*.—Cited in the *Udváha-tattwa*.

So DEVALA:—Though nearly related, a girl may be taken in marriage, if she be beyond three *gotras*.†

So also the *Matsya-purána*:—Though nearly related, a girl may be taken in marriage, if she be beyond three *gotras*.—Cited in the *Udváha-tattwa*.

SHÚLAPÁNI, too, has laid down in the *Sambandha-viveka* that "the girl who is beyond three *gotras* (from the bridegroom) may be taken in marriage, though she be one related within seven or five degrees.† Authority.

Three *gotras* of the descendants of a *bandhu* are in all cases to be counted from his own *gotra* (inclusive,) and those of the descendants of the ancestors of a *bandhu*, who is a father's or mother's maternal uncle's son, are also to be counted from his own *gotra*; but of the descendants of the ancestors of the other *bandhus* three *gotras* must be counted from their maternal grandfather's *gotras*.—See *Udváha-tattwa*. Direction.

The author of the *Nirnoya-sindhu* says:—"Nevertheless, under authority of the text to be presently cited, a man may marry a girl though nearly related, provided Remark.

* Commentary on the *Dattáka-mímánsá*, Sans., p. 24.
† Cited in the *Nirnoya-sindhu*, Chap. III, Sect i, leaf 23.

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she be beyond three *gotras*. The calculation of the three *gotras* should be made on the maternal grandfather's side, and not on one's own (that is, on his father's) side : as otherwise the daughter of the father's paternal grandfather's grand-daughter in the female line would be marriageable. But the marriage of a girl can take place with a man who is beyond three *gotras* calculated from the *gotra* of her maternal grand-father. Such is the doctrine of the *Sambandha-tattwa*, and the other books of the Bengal School."—*Nir. Sindh.*, Chap. III, Sect. i, Leaf 23.

Observation. "One should marry a girl who is not descended from the same ancient sage as he ; he must avoid five (degrees) from the mother, (and) seven from the father ; or three from the mother, (and) five from the father."—This text of POITHÍNASI is expounded by RAGHU-NANDANA in the following terms :—'In fact, by the mention of three (degrees), &c., it is meant that it is more sinful to marry a girl from the fourth to the fifth degree, both inclusive (on the mother's side), and from the sixth to the seventh degree, both inclusive (on the father's side): otherwise, the other text of POITHÍNASI, "The daughters of the mother's sister and father's sister and of the mother's brother are sisters by law, they must not be taken in marriage," would be useless.' SHÚLAPÁNI, however, holds that the avoiding of marriage with girls as far as three and five degrees, (and marrying from the fourth and sixth degrees) relate to marriages in the *ásura* and other forms, or to the marriages of the *kshatriyas*.—So it is clear that according to both opinions, marriages of *Bráhmanas* in the *Bráhma* and other forms (as far as the *ásura* form) with damsels within the fifth degree on the father's side and third degree on the mother's side, are invalid ; and, moreover, according to RAGHU-NANDANA, it is more sinful. Further, agreeably to SHÚLAPÁNI'S opinion, marriages of such girls amongst any caste in the *ásura* and the rest of the forms, and amongst the *kshatriyas* in any form whatever, are valid, but according as expounded by RAGHU-NANDANA such marriages are not only invalid, but also more sinful. Although opinions of both these authors are respected in Bengal, yet RAGHU-NANDANA is here preferrable to SHÚLAPÁNI.

Vyavasthá. **220. A wife's sister's daughter, paternal uncle's wife's sister, her daughter, step-mother's sister, her daughter, step-mother's brother's daughter, and his daughter's daughter, are not to be taken in marriage.**

Authority. In the *Grihya-parishishta*, after saying "one should not marry a girl who is a prohibited relation," the author himself points out those who are not to be taken in marriage,

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(*viz.*,) "Wife's sister's daughter, and the sister of a paternal uncle's wife." BOUDHÁYANA too:—"A step-mother's sister, and her daughter, should not be taken in marriage; also a paternal uncle's wife's sister, and her daughter, and also the daughter of the son of the mother's sister's rival wife.—*Nir. Sindh.*, Chap. III, Sect. i, p. 25.

SUMANTU:—All the wives of the father are mothers, their brothers are maternal uncles, the daughters of the latter are sisters, and the daughters of these are nieces, they also are not to be taken in marriage; otherwise they will be producing *sankaras* (mixed castes).—*Udváha-tattwa.* Authority.

A step-mother's brother's daughter and his daughter's daughter are not to be taken in marriage.—*Udváha-tattwa.* Authority.

Although, the brother of a step-mother being a maternal uncle, his daughter and daughter's daughter are (of course) sister and niece, (and as such are not to be taken in marriage,) yet as they have nevertheless been mentioned (in particular), it must be concluded that marriage with these two only (out of the descendants of a step-mother's brother) should not be contracted.—*Ibid.* Remark.

221. A man is prohibited to marry a girl who bears the same name as his mother. *Vyavasthá.*

Matsya-súkta Mahá-tantra:*—Whatever be a person's mother's name, be it concealed or known, the girl who bears that name, is called 'bearing (that person's) mother's name.' If he inadvertently takes (her in marriage), he must atone for it, and, performing lunar penance (*chándráyana*), he must forsake her entirely.—Cited in the *Udváha-tattwa.* Authority.

As to the text of *Rája-mártanda*:—"Though born of a good family, if a girl be of the same name as (her bridegroom's) mother, another name should be given her in marriage by priests with the consent of her parents"—it must be understood to be applicable to the case where the name is known after betrothment, as otherwise the above prohibition would be unmeaning or nugatory.—RAGHU-NANDANA. Consequently,— Remark.

222. If, after betrothment of a girl, it be known that she bears the same name as the mother (of the man to whom she is betrothed), then another name should be given her by priests with the *Vyavasthá.*

* A hymn to VISHNU assuming the form of a fish; it is believed to have been extracted from the *Veda.*

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consent of her parents, after which she may be taken in marriage, which in that case is not invalid.—See *Udváha-tattwa.*

Vyavasthá. **223.** It is prohibited to contract marriage with a daughter of the spiritual preceptor (*ácháryya,*) or of a pupil.*"—See *Ibidem.*

Authority. *Matsya-súkta* :—"The marriage with a girl of equal *pravaras,* with a daughter of a pupil, or of the *guru* who instructs in the *Vedas* is prohibited."—Cited in the *Udváha-tattwa.*

Authority. MANU :—"Of him who gives the natural birth, and him who gives the knowledge of the *Veda,* the giver of the knowledge of the *Veda* is the more venerable father."—Thus the daughter of such father being a sister, is not to be taken in marriage.

Vyavasthá. **224.** The marriage which is contracted by a person according to the custom of the country and the practice of his family, should always be followed in practice and is valid: this also appears to be the doctrine of the *Veda.*—*Chatur-vinsati-matam.*† See *Nir. Sindh.*, Chap. III, Sec. i, Leaf 30.

Whatever custom has, in a country, come down from generation to generation among all classes of men, that is said to be the custom of the good.—*Chatur-vinsati-matam.* See *Ibidem.*

Authority. BHRIGU :—In whatever country, town, village, or city inhabited by persons learned in three *Vedas,* a particular custom is acted upon, that custom must not be contravened.—*Ibidem.*

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* A pupil is he who receives instruction in the *Vedas.* The *ácháryya* is he who gives such instruction. Thus in the following text :—"The spiritual preceptor is he who instructs (his pupil) in the *Vedas* after investing (him) with the holy thread, whence is he denominated "*ácháryya.*"—See *ante,* pp. 107, 108.

By parity of reason, it seems also improper to marry a daughter of the spiritual preceptor, who imparts a formula or mystical text (*mantra*) of the *tantra,* or a daughter of a pupil instructed in that of the *tantra.*

† See the Preface.

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225. A *dattaka* son must not marry a girl who is connected as a *sapinda* to his adoptive or natural father, or who is of the same *gotra* with either of them.* *Vyavasthá.*

Annotations.

225. The adopted son cannot marry any kinswoman, related to his father and mother, within the prohibited number of degrees, as his consanguinal relation endures: nor can the son of two fathers marry in the general family of either.—Sutherland's Synopsis, Head Fourth.

For the purposes of marriage, mourning, &c., he (the adopted son) is not considered in the light of a stranger, and the prohibited degrees continue in full force as if he had never been removed.—Macn. H. L., Vol. I, p. 69.

"It has been asserted," says Sir William Macnaghten, and justly too, "by the author of the Elements of Hindú Law, 'that a son adopted in the ordinary way, though he cannot marry among the adoptive, yet may one of his natural relations;' but I cannot find any authority for this doctrine. He seems to have inferred from the text of *Párijáta*, 'Sons given, purchased, and the rest, who are sons of two fathers, may not marry in either family even, as was the case with *Sringa*, and *Soisira;* that adopted sons not bearing the double relationship might do so;' but the inference is clearly untenable. Indeed, Mr. Sutherland, to whom he refers as his authority, expressly declares in his synopsis, that the adopted son cannot marry any kinswoman related to his father and mother, within the prohibited number of degrees as his consanguinal relation endures."—*Ibid.* Note.

The author of the *Nirnoya-sindhu* says:—"I am of opinion that in the adopter's family the relation of *sapinda* extends to the seventh degree."—*Ibid.*

An adopted son identifies to all intents and purposes, with a natural; it follows that a marriage by such a son with the daughter of him by whom he has been adopted, would be incompetent, liable to be regarded as incestuous, like a person marrying his sister. These points were agreed in a late case before the Supreme Court at Madras after deliberation, and consulting the Judges and the Pundits of the Sudder Dewany Adawlut at that Presidency, and after obtaining the opinion of the Pundits of the Supreme Court at Calcutta, with those of the most learned native jurists in several of the provinces.—Stra H. L., Vol. I, p. 41.

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Vyavasthá. **226.** A *dattaka* son must not also marry a girl who is related as a *sapinda* or *samánodaka* to the father of his adoptive or natural mother.*

Reason. Because, his (the *dattaka* son's) relationship with the adoptive mother's father is created through connection of the oblation cake, and that with the family of his natural mother's father exists by consanguinity.*

Authority. In the family of the natural father too, the same on account of this text of GOUTAMA:—"Of the owner of the seed (*i. e.*, of the natural father) also, &c."—*Nir. Sindh.*, Chap. III, Sect. i, leaf 26.

Authority. The text ("A given son must never claim the family and estate of his natural father," &c.) must be considered applicable to the case, where every initiatory rite, from that of birth, is performed, by the adopter only; but the son given, and the rest, who are absolute *dwyámusyáyanas*, belong to both families: on account of this passage of *Párijáta*:—"Sons given, purchased, and the rest, who are sons of two fathers, may not marry in either family even, as was the case of *Sringa* and *Soisira*." 'In either family' —in the family of the natural father, and in that of the adopter.—*D. Mím.*, Sect. vi, para. 47.

Authority. On this subject, it is replied by a certain author:—"She who is not connected, as *sapinda*, to his mother and father (*pitus*), and not belonging to the general family of either, is approved amongst twice-born men, for espousal and connubial intercourse."† As for the mentioning a female not connected as *sapinda* to the father, in this text of MANU, in which [if the son of the body were regarded], it should have been expressed,—'not connected as *sapinda* to himself' —that is only to declare that the marriage of an adopted son must not take place with a woman connected, as *sapinda*, to the adoptive father: otherwise, the marriage of a bridegroom, the eighth in descent from the common ancestor, (his kindred being through his father) with a bride, the sixth from such ancestor (her descent being through her mother), might not take place: for being related as *sapinda*, to the father of the bridegroom, her non-connection as such is wanting. But what was required, would not thus result: for it would be at variance with the practice of good persons, and texts of every code of law; such as: "Beyond

* See the definition of *sapinda* by oblation cake, and of the *samánodakas* at pages 102, 103, 106, 107, and of the *sapinda* by consanguinity in the book on Adoption.

† MANU, Chap. III, *v.* 5.

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the fifth and seventh degrees, on the mother's side, and the father's side, respectively, (*mátritah-pitritas-tathá*) [the relation of *sapinda* ceases"]. Nor can it be alleged, that his objection is equally applicable to the adopted son also, since it follows; such son, the eighth, and a damsel, the sixth, in degree, by reason of her being related, as *sapinda*, to his father, may not intermarry. For, under this text, subsequently recited ("the relation of *sapinda* ceases with the seventh person, &c., &c.,") the father of the adopted son, the seventh in descent, not being related, as *sapinda*, to the common ancestor,—by reason of the bride, the sixth in descent, consequently not being so connected to him,—such bride, the sixth, and the father of the bridegroom, the seventh, are not mutually connected as *sapindas*: as has been already declared. Therefore, there is no inconsistency in alleging that this text even is decisive of the relation of the adopted son as *sapinda* [to the daughter of his adoptive father's sister and so forth].—*D. Mím.*, Sec. VI, § 27.

But should it be objected, if the son given bear not the relation of *sapinda* to the family of the adoptive father, why should not his marriage take place therein? Excellent! we reply,—on account of his belonging to the same general family.—*Ibid.*, § 25. Authority.

Then his marriage might take place with the offspring of the adopter's sister and so forth, for connection by identity of family and that of *sapinda* are wanting: nor do we at present find any text prohibitory of this. On the contrary, there are passages in favor of it, such as,—"Let not any one marry the daughter of that person who taught him the *sávitrí* incantation: but marriage in the general, or also in the peculiar, family of that person, does not, however, occasion an offence." Yet this is not an intended consequence: for it is at variance with the *universal practice* of good persons, uninfringed, and by holy writ unforbidden. Therefore, what reason is there against marriage in such instance.—*Ibid.*, § 26. Authority.

With respect to the sons given, and the rest being sons of two fathers, this text and that of SATYÁSHÁDHA, commencing ("of absolute *dwyámushyáyanas*") are authority. With the same intent it is declared also in the *Pravara-manjarí*: "For the most part, sons given, purchased, and made, the son of the appointed daughter and so forth, belong to both general families with connection to the patriarchal saints of each." From this alone on the occasion of the marriage of those appertaining to two families, both families with each of which their connection to the patriarchal saints is involved, must be avoided.—*Ibid.*, § 48. Authority.

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Authority. "She who is not connected, as *sapinda*, to his mother and father, *and* not belonging to the general family (*i.e.*, race) of either, is approved amongst the twice-born men, for espousal and connubial intercourse."*—On account of the conjunctive particle 'and (*cha*,)' the construction is,—'who is not connected as *sapinda* to his father (as well as mother);—the term 'father' is used to exclude (from marriage) a female related, as *sapinda* to, and belonging to, the general family (*gotra*) of the natural father, also of an adopted son, although exclusively belonging to the family of his adoptive father.—*D. Ch.*, Sec. IV, § 8.

Authority. SHÚLA-PÁNI also says:—"The term father (in the above text) is used to prohibit one who has two fathers (as *kshetraja* and the rest) to marry a girl belonging to the general family (*gotra*) either of his natural or adoptive father, although he belongs to the general family of his adoptive father alone."

"As many degrees as there may be of forefathers, with so many, their own forefathers, let sons given and the rest associate the deceased. In order, their sons, with two forefathers, their grandsons with (*samam*) one, (should do) the same. The fourth degree is excluded. This (relation of *sapinda*) extends to three degrees." According to this text of KÁRSHNÁJINI, it should not be argued that the relation of *sapinda* extends to three degrees, in the family of the natural father, by consanguinity, and in that of the adopter through connection of the oblation-cake, because the relation of *sapinda* in question does not apply to marriage, but is an universal relation of that denomination, predefined as extending to the seventh degree in the line of the father, and to the fifth in that of the natural maternal grandfather.—See *D. Ch.*, Sec. III, para. 19, *et. seq.*

Vyavasthá. **227. A younger brother is prohibited to marry while his elder brother of the whole blood remains unmarried: he who violates this prohibitory rule, commits the offence of *pari-vedana*,† and sinks to a region of torment.**

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* MANU, Chap. III. *v.* 5.

† *Pari-vedana* is the offence of superseding an elder uterine brother in marriage or in establishing the sacrificial fire (*agni-hotra*). Thus, MANU and SÁTÁTAPA cited in the *Nirnoya-sindhu*:—"He that becomes married or worshipper of the sacrificial fire (*agni-hotrí*) while his elder (uterine) brother continues unmarried, and *non-gnihotrí*, is known to be a '*pari-vettá* and the elder brother a '*pari-vinna*.'—*Nir. Sindh.*, Chap. III, Sect. i, leaf 43.

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MANU :—He, who makes a marriage contract with connubial fire, while his elder brother continues unmarried, is called 'a *pari-vettri*,'* and the elder brother, 'a *pari-vitti*.'† The *pari-vettri*, the *pari-vitti*, the damsel thus wedded, the giver of her in wedlock, and fifthly, the performer of the nuptial sacrifice, all sink to a region of torment.—Chap. III, *verses* 171, 172. Authority.

HÁRÍTA :—If a younger brother marry while his elder brother remains unmarried, he becomes *pari-vettá*,‡ such elder brother becomes *pari-vinna*,§ the girl so married is *pari-vedaniyá*, the giver of a girl (in such marriage) is *pari-dáyí*, the priest who performs the rites (of such marriage) is *pari-kartá*: all of them are degraded (for sin).—See *Udváha-tattwa*. Authority.

GARGA cited by RAGHU-NANDANA :—One should neither contract a marriage, nor establish the sacrificial fire, while his elder uterine brother continues unmarried and *non-agnihotrí*;‖ if he does, he shall be degraded for sin.—*Nir.-Sindh.*, Chap. III, Sec. i, leaf 43. Authority.

The word '*uterine*' being used, no blame attaches to step-brothers, *dattakas*, and the rest who are not of the same womb. No blame also attaches to a *dattaka* (in marrying), while his uterine brother continues unmarried. This is said by VASHISHTHA (cited in the *Hemádrí*).—"No blame attaches to the paternal uncle's sons, step-brothers, sons of other women (*a*), in contracting a marriage or establishing the sacrificial fire, by superseding (a paternal cousin, a step-brother, or a *dattaka* brother).—*Nir. Sindh.*, Chap. III, Sect. i, leaf 43. Exposition.

(*a*) '*Sons of other women*,'—that is *dattakas* and the rest. *Ibidem*. Hence,— Explanation.

228. One can with impunity supersede in marriage his paternal cousin, step-brother, and his father's adopted son, and such uterine brother as is adopted by another man, or being himself an adopted son, can supersede his elder uterine brother. *Vyavasthá.*

Thus, where the adopted son may be unmarried, the offence of *pari-vedana* is not incurred by the marriage of a Authority.

* '*Pari-vettri*,' that is *pari-vettá*. † '*pari-vitti*,' that is *pari-vinna*.

‡ *Pari-vettá*,—one guilty of having married before his elder brother of the whole blood.

§ *Pari-vinna*,—one passively guilty of being superseded by his younger brother in marriage.

‖ '*Agni-hotrí*'—is one who establishes or worships a consecrated or sacrificial fire.

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legitimate son subsequently born: nor is there any objection against an adopted son marrying before his elder whole brother.—*D. Cha.*, Sect. IV, § 6.

Authority. Accordingly, sons given and the rest do not incur the guilt of a *pari-vettri* and the like: for a text of GOUTAMA recites:—"By marriage and establishing a consecrated fire, the offence of '*pari-vedana*' does not attach to a half brother (*b*), a son given (*c*), and the son of a paternal uncle likewise."—*D. Mím.*, Sect. VI, § 54.

Explanation. (*b*) 'To a half brother.'] On the marriage and so forth of either of two brothers, by different mothers, the offence denominated '*pari-vedana*' is not incurred. This is the meaning.—*Ibid.*, § 55.

Explanation. (*c*) '*A son given.*'] It is meant that, although there be an elder brother in the family of the natural father, the adopted son is not (should he marry and so forth) a '*pari-vettri*,' nor also by such previous marriage and the like of the younger is the elder a '*pari-vitti*,' or a person passively implicated in the criminal acts alluded to.—*Ibid.*

Vyavasthá. **229.** One should not supersede in marriage his elder brother of the whole blood, even though permitted by him.

Authority. *Práyashchitta-viveka.*—A marriage is blameable even though contracted with the permission of the elder (uterine) brother not married.

Authority. "Let him do (*i. e.*, establish the sacrificial fire) with the permission of (his) worthy brother." It is so (laid down) in the *Madana-párijáta.* But marriage should not be contracted even with such permission. This is the meaning.—*Nirnoya-Sindhu*, Chap. III, Sect. i, leaf 43.

Exception to the above:—

Vyavasthá. **230.** A twice-born man, however, commits no offence by superseding in marriage his elder uterine brother who lives in a foreign country (*d*), who is a eunuch or otherwise impotent, or who is dumb, blind, deaf, an idiot, degraded, equal to a *shúdra*, devoted to the *yoga-shástra* (*e*), a beggar, not a house-keeper, or the like.

Authority. SÁTÁTAPA:—There is no offence in superseding in marriage an elder brother who is gone to a foreign country (*d*), who is degraded, who is a beggar, or is devoted to the *yoga-shástra* (*e*).—*Udváha-tattwa.*

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(*d*) 'A foreign country.'] See the definition thereof in the Book on Partition.

(*e*) '*Yoga-shástra*' is meditation consisting in the abstraction of the mind from worldly objects, and in the union of *one's jívátmá* with the Holy Spirit (God). Explanation.

KÁTYÁYANA says, that no offence is committed in superseding also impotent persons and the rest.—"One does not commit an offence by superseding in marriage him who lives in a foreign country, or who is a eunuch or impotent, or *eka-vrishana* (*f*), or who is not of the same womb (*g*), or who is a whoremonger, degraded, equal to a *shúdra* (*h*), very much diseased, an idiot (*i*), dumb, blind, deaf, hump-backed, dwarf, lame, very old, or who is not a householder(*j*), or who is devoted to agriculture, or to the (service of the) ruling power, or who is devoted to increase (his) wealth, or who acts according to his own wishes (*k*), or who is *kulata* (*l*),* mad, or a thief."—*Nir. Sindh.*, Chap. III, Sect. i, leaf 43. Authority.

One does not commit an offence by superseding in marriage his elder brother who lives in a foreign country, who is a eunuch or impotent, or *eka-vrishana*(*f*), or who is not of the same womb (*g*), or who is a whoremonger, degraded, equal to a *shúdra* (*h*), very much diseased, an idiot (*m*), dumb, blind, deaf, hump-backed, dwarf, *kunthaka* (*m*), very old, or who is not a householder (*j*), or who is devoted to agriculture, or to the ruling power, or to increase wealth, or is one who acts according to his own wishes (*k*), or is a *kulata*(*l*), a mad man, or a thief. Though in a hurry, one must wait three years for (his elder brother who is) devoted to increase wealth, to the ruling power, or to agriculture, or (who is) gone abroad. If [the elder brother,] gone abroad be unheard of (*n*), the younger may marry after waiting for one year; and if he then return, the latter is to perform part of the *lunár* penance for purification from this sin.—A text of *Chhándoga-parishishta* cited in the *Udváha-tattwa*. Authority.

(*j*) *Eka-vrishana.*] Having only one testicle : a kind of eunuch.—*Udvàha-tattwa.* Explanation.

(*g*) Not of the same womb.] A brother born of a step-mother : consequently, there is no offence in contracting a marriage while a brother born of a different mother remains unmarried—*Ibid.* Explanation.

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* In the lithographed copies of the *Nirnoya-sindhu*, the word '*kutila*,' which means 'wicked' is put down instead of '*kulata*.' This must be a clerical error.

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Explanation. (*h*) '*Equal to a shúdra.*'—It is declared by MANU, "*Bráhmanas*, who tend herds of cattle, who trade, who practise mechanical arts, who profess dancing and singing, who are hired servants or usurers, let the Judge exhort and examine as if they were *shúdras.*—*Udváha-tattwa.*

Explanation. (*i*) '*An idiot,*'—a person deprived of the internal faculty, or incapable of discriminating right from wrong.—*Mitákshará* cited in the *Udváha-tattwa.* See the Chapter treating of the Exclusion from Inheritrnce.

Explanation. (*j*) '*Not a householder,*'—that is, prohibited by law to have a wife, such as *noishthika* or perpetual *Brahmachárís*, hermits and *Bhikshus.*—*Ibid.*, See *ante*, page 113.

Explanation. (*k*) '*One who acts according to his own wishes,*—that is, who acts according to his own inclination regardless of the (ordinances of the) scripture and law.—*Ibid.*

Explanation. (*l*) '*Kulata.*] One who goes to a different *gotra* or family: such is the interpretation of NÁRÁYANA UPÁDHYÁYA: by this he means that he whose *gotra* (race) is changed into that of another, such as a *dattaka* or any other description of adopted son, is a *kulata.*—*Ibid.*

Conclusion. Accordingly, sons given and the rest do not incur the guilt of a *pari-vettá* and the like: for a text of GOUTAMA recites: "By marriage and the establishing a consecrated fire, the offence of '*pari-vedana*' does not attach to a half brother, a son given, and the son of a paternal uncle likewise."—*D. Mím.*, Sect. vi, § 54.

Exposition. 'To a half brother.'] On the marriage and so forth of either of two brothers, by different mothers, the offence denominated *pari-vedana* is not incurred. This is the meaning. *A son given.*] It is meant, that, although there be an elder brother in the family of the natural father, the adopted son is not (should he marry and so forth), a '*pari-vettri,*' nor also by such previous marriage and the like, of the younger, is the elder a '*pari-vinna,*' or a person passively implicated in the criminal acts alluded to."—*Ibid.*, § 55.

Explanation. (*m*) '*Kunthaka,*'—indifferent to all affairs.—*Udváha-tattwa.*

Exposition. (*n*) 'Unheard of,'—that is, if good tidings (or the existence) of the elder brother gone abroad be not heard of, his younger may marry after having waited for one year; should the elder brother subsequently return, the younger, to atone for the sin committed in superseding his elder brother in marriage, must perform the expiation denominated '*Prájápatya.*'—*Práyaschitta-viveka.* See *Udváha-tattwa.*

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The waiting for three years for an *elder brother* gone abroad relates to the case where he is gone abroad for purposes other than the acquisition of science and religious merit;* it being so declared in the subjoined texts of VASHISHTHA and GOUTAMA :— Remark.

VASHISHTHA :—Should a younger brother marry without waiting for his elder brother, gone abroad, he must perform the penance: it is proper for a person to wait twelve years for his elder brother who is gone abroad to obtain religious merit and property, and is often heard of. It is not (however) proper to wait for (an elder brother who is) a mad man, a sinner, leprous, degraded, impotent, or afflicted with phthisis or a like disease. Authority.

GOUTAMA :—In the case of a *Bráhmana* elder brother (going abroad) for the acquisition of knowledge, the younger should wait for twelve years before contracting a marriage or commencing the worship of a consecrated fire: some ordain that he should wait for six years.* Authority.

The author of the *Ratnákara* adds the following text of GOUTAMA :—" (The elder brother) being heard of, the younger should go to him, but he should refrain from doing so if he (the elder brother) has quitted the condition of a householder," and thus interprets it: "The elder brother living abroad, the younger (brother) should go to him to cause him to marry and worship the consecrated fire; he should, however, refrain from so doing if he has quitted the condition of a householder."* Authority.

231. In the cases of persons of the *Bráhmana, Kshatriya, Voishya,* and *Shúdra* castes, twelve, ten, eight, and six years should respectively be waited for. *Vyavasthá.*

SHÚLAPÁNI :—Persons (*i. e.* elder brothers) of the *Bráhmana, Khatriya, Voishya,* and *Shúdra* tribes, should respectively be waited for for twelve, ten, eight and six years.—*Práyaschitta-viveka.* Authority.

232. If an elder brother gone abroad be unheard of, his younger brother may marry after having waited for one year; should the elder brother return thereafter, the younger brother must perform the prescribed penance to expiate the sin thus committed. *Vyavasthá.*

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* *Udváha-tattwa.*

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Authority. *Chhándoga-parishishta* :—Though in a hurry, one must wait three years for (his elder brother who is) devoted to increase wealth, to the ruling power, or to agriculture, or (who is) gone abroad. If [the elder brother] gone abroad, be unheard of, the younger may marry after waiting for one year; and then if the former should return, the latter is to perform part of the *lunar* penance for purification from this sin."—See *Udváha-tattwa.*

For further authorities, see *ante,* pages 191, 192.

Vyavasthá. **233. The marriage of a younger sister is vitiated if contracted before that of her elder sister, unless she have such defects, mental or corporal, or both, as to be *civiliter mortuus.***

Authority. DEVALA :—A younger sister married before the marriage of her elder sister, must be known (to be) *agre-didhishu,* and the elder sister to be '*didhishu.*'—*Udváha-tattwa.*

Authority. VASHISHTHA :—The husband of the girl denominated '*agre-didhishu*' should, after undergoing the austere penance, for twelve nights (*d*), marry and give her away (*e*), and the husband of the *didhishu* must perform the austerest of penances, and having given (her) away to him, should marry again.—*Ibid.*

Explanation. (*d*) '*Austere penance for twelve nights,*'—that is, the penance denominated the '*paráka,*' which must be performed, because the sin is great.—*Udváha-tattwa.*

Exposition. (*e*) '*Should give her away,*'—that is, he must give the younger sister to the husband of the elder. The elder sister must likewise be given to the husband of the younger. This, however, is declared by law for the sake of humiliation, and not for the purpose of co-habitation; for a text of SUMANTU in the chapter on marriage declares that they must not again be co-habited with. And a text cited by BHAVADEVA BHATTA (ordains) that "she who is deserted is to be supported with food and raiment."—*Ibid.*

Remark. The prohibition against marriage of a younger brother before that of his elder brother, and that against the marriage of a younger sister before that of her elder sister, are not moral precepts or mere directory, but are mandatory and obligatory.* In society, too, such marriage is

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* See *ante,* page 189, and also the above authorities explanation and exposition.

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considered not only an abominable act, but, except in the exceptional cases, it is never practised by persons who are real *Hindús*.

The other rules and precepts respecting males on this subject are also applicable to females, provided there be no impediment to their being so, conformably to the maxim: "The sense of the law, as ascertained in one instance, is applicable to others also, provided there be no impediment."* Remark.

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234. Of all the girls described, those only, though married, do not become legal wives, whose husbands are degraded or doomed to hell for marrying them, or are ordained to desert them, and to perform penance to atone for the offence incurred in marrying them.† *Vyavasthá.*

Thus desertion and penance being enjoined in (the marriage of) the descendants of *sapindas* and of those sprung from the same ancient sage (*sa-gotra*), the girls who are prohibited to be taken in marriage for unseen causes of defects, do not become wives: consequently, the defect of such girls is not removed, nor is the girl, so married, capable of performing religious acts (in conjunction with her husband).—*Udváha-tattwa.* Authority.

KULLÚKA-BHATTA:—In the matter of marriage, as it has been ordained in this text—"He who inadvertently marries a girl sprung from the same original stock with himself (*sa-gotra*), must support her as a mother," and as it has been said (by certain legislators) that if girls of the same *gotra* and so forth be taken in marriage, they must be deserted, and that penance must be performed if a marriage be contracted with a girl of the same *gotra*; consequently, together with those, the girls related as mother's *sapindas* do not also become wives. Authority.

In expounding the text—"A *Bráhmana* who marries a girl of his own *gotra* and *pravaras*," &c.—ŞHÚLA-PÁNI remarks, that the mention of the girls of the same *gotra* and *pravaras* is a mere instance of a general meaning: it is comprehensive of all the girls who are not to be taken in marriage.—See *Práyashchitta-viveka*, and 3 Dig., 329, 330. Authority.

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* *Dá. Bhá.*, Chap. III, Sec. ii, § 31: Annotation.—*Coleb.* Dig., Vol. III, pp. 18, 19, 99, 106. *Vide* Precedents, page 203.

† See *ante*, pages 179, 180, 183, 184, 185, 189, 194.

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Remark. All of the girls prohibited to be taken in marriage being (thus) placed by SHÚLA-PÁNI on an equal footing with the girls of the same *gotra* and *pravaras*, it follows that, according to him, they, though married, do not become wives, as well as those of the same *gotra* and *pravaras*.

Vyavasthá. **235.** Girls with visible defects do, however, become wives, although it is prohibited to take them in marriage.

Illustration. Girls with defects, visible or invisible, are described thus by MANU :—6. "In connecting himself with a wife, let him studiously avoid the ten following families, be they ever so great, or ever so rich in kine, goats, sheep, gold, and grain.—7. The family, which has omitted the prescribed acts of religion; that which has produced no male children; that in which the *Veda* has not been read; that which has thick hair on the body; and those which have been subject to hemorrhoids, to phthisis, to dyspepsia, to epilepsy, to leprosy, and to elephantiasis.—8. Let him not marry a girl with reddish hair, nor with any deformed limb; nor one troubled with habitual sickness; nor one either with no hair or with too much; nor one immoderately talkative; nor one with inflamed eyes.*—9. Nor one with the name of a constellation, of a tree, or of a river, of a barbarous nation, or of a mountain, of a winged creature, a snake, or a slave; nor with any name raising an image of terror.—11. Her who has no brother, or whose father is not well known, let no sensible man espouse, through fear, lest, *in the former case*, her father should take her first son as his own *to perform his obsequies*; or, *in the second case*, lest an illicit marriage should be contracted."—Chapter III.

Remark. Of the above, the text No. 9 is descriptive of girls with invisible defects, while the other texts describe those of visible defects.

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* But,—

Let him choose for his wife a girl whose form has no defect; who has an agreeable name; who walks gracefully like a phernicopteros, or like a young elephant; whose hair and teeth are moderate respectively in quantity and in size; whose body has exquisite softness.—MANU, Chapter III, *verse* 10.

Let the man who has unobstructedly finished his career of life as a *Bramachárí*, marry a damsel who is endowed with good qualities, amiable, younger in age, not diseased, nor without a brother, not previously married to another man, and neither a *sapinda* nor of the same *gotra* and *pravaras* with himself.—YÁJNAVALKYA cited in the *Nirnoya-sindhu*, Chapter III, Section i, leaf 22.

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236. Girls bearing the names of constellations, of trees, of rivers, or the like, though with unseen defects, being included by MANU amongst the texts descriptive of visible defects, are reckoned as being with visible defects; and, consequently, there is no apprehension of their not becoming wives, if married. *Vyavasthá.*

In those girls whom it is allowed or prohibited to marry on account of good or bad qualities—as of the families which omitted the prescribed acts of religion,—there is, however, no want of wifehood (inasmuch as such girls become wives), though married in violation of the above rule. Consequently, MANU has separated the texts,—"Be they ever so great or ever so rich," &c. The prohibitory text—"Nor one with the name of a constellation, of a tree, or of a river," and so forth, being included amongst the above texts, does not deprive a girl (falling within the description thereof) of being the wife of the man to whom she is married.—KULLÚKA-BHATTA'S Commentary on MANU. Authority.

SECTION VI.

ON BIGAMY AND POLYGAMY.

237. Bigamy appears to have been prohibited *even* to man, unless for any of the justifiable causes, namely,—barrenness, death of all (male) children, production only of daughters, lasting or incurable disease, immorality, mischievousness, drinking any inebriating liquor, speaking unkindly to her husband, showing hatred to him, wasting his property, or the like;—for any of these faults a wife may be legally superseded by another. *Vyavasthá.*

Annotations.

237. *The Right of Supersession.*—It remains to consider the doctrine of supersession; by virtue of which, though the woman can marry but once,—to the man, a plurality of wives at the same time is competent; though not at his mere pleasure,—the attempt which is *justifiable* in some instances, in others only *admissible*, being, where it can neither be justified, nor tolerated, illegal.—Stra. H. L., Vol. I, p. 52.

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Nevertheless, a barren wife should be superseded in the eighth year, she whose (male) children are all dead, in the tenth, she who brings forth only daughters, in the eleventh, and the rest at any time.

Authority. MANU :—A wife, who drinks any spirituous liquor, who acts immorally, who shows hatred *to her lord*, who is *incurably* diseased (*a*), who is mischievous, who wastes his property, may at all times be superseded by another wife. A barren wife may be superseded by another in the eighth year; she whose children are all dead, in the tenth; she who brings forth *only* daughters, in the eleventh; she who speaks unkindly, without delay. But she who, though afflicted with illness, is beloved and virtuous, must never be disgraced, though she may be superseded by another wife with her own consent.—Chap. IX, *vs.* 80—82. See *Mitákshará Áchárádhyáya*, pp. 13, 14.

Explanation. (*a*) 'Incurably diseased.'] Afflicted with leprosy or the like.—KULLÚKA-BHATTA.

Authority. YÁJNAVALKYA :—The wife who drinks inebriating liquors, who is diseased (*b*), quarrelsome (*c*), or barren, who wastes his wealth, who speaks unkindly, (or) who brings forth only daughters, may be superseded by another wife; and so may she be who manifests hatred to her husband (*d*).—*Mit. Áchá.*, pp. 13, 14.

Explanation. (*b*) 'Diseased.'] Afflicted with a lasting malady.—*Ibid.*

Explanation. (*c*) 'Quarrelsome.'] Contumacious.—*Ibid.*

Explanation. (*d*) 'Who manifests hatred to her husband.']—Who always does injury to him.—*Ibid.*

Authority. ÁPASTAMBA :—If his wife be virtuous, and have borne a son, let not a man contract another marriage, unless he do so on the loss of his wife or son.—Cited by KULLÚKA-BHATTA.

Authority. YÁJNAVALKYA :—But the superseded wife must be supported, as otherwise a great offence is incurred.—*Mit. Áchá.*, page 13.

Annotations.

237.—The grounds that justify it, (*i. e.*, the right of supersession,) regard the conduct, the temper, or the health of the wife; to which may be added barrenness, or during a period of ten years, the production only of daughters.—Stra. H. L., Vol. I, p. 53.

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238. In the event of a man going to marry a second wife, the law enjoins him to obtain the consent of his first wife, and to console her by paying wealth equal to the expenses of his second marriage; but if any *stri-dhan* has already been bestowed on her by her husband or his family,* then only a part or moiety [*ardha* (*e*)] of the expenses should be given to her. *Vyavasthá.*

See Precedents, pages 401, 402, and Partition.

YÁJNAVALKYA:—To a woman whose husband marries a second wife, let him give an equal sum (as a compensation) for the supersession, provided no separate property (*stri-dhan*) have been bestowed on her; but, if any have been assigned, let him allot *ardha* (*e*).† Authority.

(*e*) '*Ardha*,' in the masculine gender, signifies, part in general, not equal part, or exact half, which is signified in the neuter gender.—*Coleb.* Dig., Vol. III, p. 18. Explanation.

The above interpretation of JAGAN-NÁTHA'S is corroborated not only by the Sanskrit Dictionaries in Sanskrit, but also by PÁNINI, the greatest and best of all the Sanskrit Grammars now extant.

The authors of the *Dáya-bhága*, *Dáya-krama-sangraha* and of most of the other law-books of the Bengal school, have interpreted the word "*half*," used in the above text of YÁJNAVALKYA, in the sense of "a moiety."—See *Dá. Bhá.*, Chap. III, Sect. ii, § 31; *Dá. Kra. Sang.*, Chap. VI, § 28, 29; *Dá. Ta.*, Chap. II, § 18; and also the section treating of the allotment of a share by a father to his sonless wives. Remark.

MAHESHWARA, one of the eight commentators of the *Dáya-bhága* has thus interpreted the words:—"Let him allot half." The allotment of a moiety implies that the other moiety is completed by the woman's separate property. Else so much only should be given as would make her allotment equal to the son's.—See *Dá. Bhá.*, Chap. III, Sect. ii, § 3, Annotation. Remark.

Annotations.

238. She who is superseded should be cherished with gifts, honor, and good treatment by her husband, who failing to do so, incurs a great offence, and becomes punishable as hereafter mentioned.—*Mit. A'chá.*, Sans., p. 13.

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* *Vide Coleb.* Dig., Vol. III, pp. 17—19.

† *Dá. Bhá.*, Chap. III, Sec. ii, § 31.—*Dá. Ta.*, Chap. II, § 18. *Vide Coleb.* Dig., Vol. III, p. 17.

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Remark. JAGAN-NÁTHA's exposition of the foregoing text of YÁJNAVALKYA may be said to agree with that of MAHESHWARA above given. The same runs thus :—"By one who desires a second marriage, an equal present must be given to satisfy the former wife, as much as is settled *for the new wife;* not more, nor less. But if she has already received such wealth as is usually given to a woman from her husband's family (for the text coincides with the preceding,*) then a moiety, that is, less, shall be given : the equivalent present shall be completed by including the female property received from her *husband's* family; since it is a rule that an exposition of law affirmed in one case shall be extended to others, unless some impediment occur, and since it is necessary to satisfy the question, what should be done when female property has been already given. Therefore should the same be established in the present case. SRÍ-KRISHNA TARKÁLANKÁRA says :—'As much should be given to the superseded wife, as to the second wife.' But VIJNÁNESHWARA thinks the word 'equal' signifies so much as is expended in the second wedding."†—*Coleb.* Dig., Vol. III, pp. 17, 18.

Conclusion. The expositions given by MAHESHWARA and JAGAN-NÁTHA, which agree with that of the authors of the *Mitákshará* and other law books, must be said to be equitable as well as consistent with the reason of the law (*f*), and, being so, ought to be followed in practice. "A decision," says VRIHASPATI, "must not be made solely by having recourse to the letter of written codes: since, if no decision were made according to the reason of the law, there might be a failure of justice."‡ YÁJNAVALKYA likewise says :—"If two texts differ, reason (or that which it best supports) must in practice prevail."§

(*f*) '*Consistent with the reason of the law,*'—because, if the superseded wife had received *stri-dhan* amounting to less, or much less, or more, or much more, than a half of the amount of the expenses of the second marriage, and still if an exact moiety be given to her, then she will have less, or much less, or more, or much more, than the amount equal to the sum which was expended in superseding her, and which it appears to be the intent of the law to allot to her; for, surely, the intent of the law could not reasonably and

* The preceding text will be found at page 489.

† Mr. Colebrooke says :—"See passages of YÁJNAVALKYA and VIJNÁNESHWARA quoted by JAGAN-NÁTHA, 3 Dig., 8 Vol. Ed., pp. 17, 18. Also, *Mitákshará* on Inh., Chap. II, Sect. XI, p. 35.—The woman was entitled to a compensation amounting, with her previous *stri-dhan*, to a value equivalent to the expenses of the second marriage."—Stra. H. L. Vol. II, p. 51.

‡ *Coleb.* Dig., Vol. II, p. 128. § *Ibid.*, Vol. III, p. 505.

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consistently be construed to be this, that the compensation of the superseded wife should in one case be less or much less, and in another, more or much more, than the sum cost in the supersession. The word '*ardha*,' used in the above text of YÁJNAVALKYA, must, therefore, be taken to be in the neuter gender, meaning not a moiety, but only a portion, the extent of which should be that which, together with the *stri-dhan* of the superseded wife, will be equal to the sum cost in superseding her.

239. Polygamy is allowable or justifiable for the same reason or reasons as bigamy is. *Vyavasthá.*

SECTION VII.

EFFECTS OF MARRIAGE, &c.

The effect of marriage is the union of the bride and bridegroom. Upon the performance of the nuptial ceremonies and rites, more especially by the recitation of this text of the *Veda*: "Bones (identified) with bones, flesh with flesh, and skin with skin,"[1] the husband and wife become as it were one person. So MANU says: "The husband is even one person with his wife."[2] So also VRIHASPATI: "In Scripture, and in the code of law, as well as in popular practice, the wife is declared to be half the body of her husband, equally sharing the fruit of pure and impure acts. Of him, whose wife is not deceased, half the body survives."[3] Accordingly, AMARA SINHA, in his excellent Dictionary, has given the following significations of the term *Patní* or wife:—"*Patní* is the wife who is married in due legal form, and who is (as it were) a second self (to the husband), and who is an associate in religious rites." Effects of marriage.

From the above, as well as from the texts subjoined, it is clear that a man and woman, by the holy union of matrimony, become as it were one person for religious and domestic purposes. "To be mothers were women created, to be fathers, men; religious rites are, therefore, ordained, in the *Veda*, to be performed together with the wife."[4] "Let the wife (*Patní*) perform the *Vrata*[5] of her husband, and let the

1 See *Dá. Bhá.*, Chap. IV, Sect. ii, § 14, and *Dá. Kra. Sang.*, Chap. II, Sect. ii, § 4.

2 Chap. IX, *v.* 45. 3 See V, Part i, pp. 32—34.

4 MANU, Chap. IX, *v.* 96.

5 A religious act, a meritorious act of religion, a vow for the performance of a religious act, a voluntary religious observance.

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husband do that of his wife; and should they both be unable, (still the performance of) their *Vrata* must not be stopped."[6]

"*Patní* signifies a woman espoused in lawful wedlock, conformably with the etymology of the term as implying a connection with religious rites."[7] "The term '*Patní*' (wife), anomalously derived from '*Pati*' (husband), is employed when connection with sacrifices (meaning religious rites) is indicated."[8]

ÁPASTAMBA says:—"A partition does not take place between a wife and her lord. From the time of taking her in marriage, her aid in all acts is required, as well as her participation in the pure and impure fruits of *action*, and *her concurrence* in the receipt of wealth: sages do not deem it a theft, if a gift be made by a wife for a *just* cause, during the absence of her husband.[9]

Now let us see how far the oneness of husband and wife serves for civil purposes. Although the sage DATTA has said: "Wealth common to the married pair,"[10] yet such is not always the case. In allusion to the above and some other like texts, the author of the *Mitákshará* says:—"As respects the wife's ownership in the property of her husband, it consists in this that—'If she make a gift which is indispensably necessary, expend money in periodical ceremonies, in entertaining guests, and so forth, while her husband is absent, such ownership will save her from the guilt of theft:' so say MANU and the rest." Such also is the prevalent practice; and not what is signified by the wording of the text in question; as otherwise, the wife would have been required to join at every alienation of the property made by the husband. Then as respects the wife's separate property (*strí-dhan*), the husband has no interest whatever in what constitutes her *soudáyika strí-dhan*. Thus KÁTYÁYANA:—"That which is received by a married woman or a maiden in the house of her husband or of her father, from her husband or from her parents, is termed the gift of her affectionate kindred. The independence of women, who have received such gifts, is recognized in regard to that property; for it was given by their kindred to soothe them, and for their maintenance. The power of women over the gifts of their affectionate kindred is ever celebrated,

6 A text of the *Garura-purána* cited in the *Ekadáshi-tattwa*, page 52.

7 *Mit.* In., Chap. II, § 5. 8 *Smri. Chan.*, Chap. XI, Sect. i, Cl. 9.

9 *Coleb.* Dig. Vol. III, pp. 27, 28.

10 *Vide Coleb.* Dig., Vol. III, p. 488.

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both in respect of donation and of sale according to their pleasure, even in the case of immoveables. Neither the husband, nor the son, nor the father, nor the brothers, can assume the power over a woman's property to take it or to bestow it. If any one of these persons by force consume the woman's property, he shall be compelled to make it good with interest, and shall also incur a fine. If such person, having obtained her consent, use the property amicably, he shall be required to pay merely the principal when he becomes rich. But, if the husband have a second wife, and do not show honor to his first wife, he shall be compelled by force to restore her property, though amicably lent to him. If food, raiment and dwelling be withheld from the woman, she may exact her own, and take a share (of the estate) with the co-heirs."* The husband has no ownership also in the inherited property of his wife, though in a famine or other distress, or for the performance of a religious act, indispensably necessary, the husband can take his wife's *stri-dhan* of any description.†

It is only the property which a woman obtains from any other than the family of her father, mother, or husband, and that which she earns by the exercise of an art, that her husband is entitled to take even without distress.* And to the wealth thus earned by one's wife, the commentators have restricted the application of the following text: "Three persons, a wife, a son, and a slave, are declared *in general* to have no wealth exclusively their own: the wealth which they may earn, is *regularly* acquired for the man, to whom they belong."[1] KULLÚKA-BHATTA, therefore, in expounding the text of MANU,—"The husband is even one person with his wife,"[2] has very properly added to it—"For all domestic and religious, not for all civil, purposes;" and Sir William Jones, to his translation of the above text of MANU, has, by way of inuendo, added the above exposition of KULLÚKA-BHATTA. See the italicised words at the end of the text in question.

DUTIES OF HUSBAND AND WIFE.

"I will now propound the immemorial duties of man and woman, who must both remain firm in the legal path, whether united, or separated."[3]

Duties of a husband to his wife.

A wife, given by the gods, who are named in the bridal texts, let the husband receive and support constantly, if she be

* See the Chapter on *Stri-dhan*.

† *Vide* Precedents, page 400.

1 MANU, Chap. VIII, *v.* 416.

2 Chap. IX, *v.* 45, already cited.

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virtuous, though he married her not from inclination: such conduct will please the gods.[3] MANU declared, that a mother and father in their old age, a virtuous wife, and an infant son, must be maintained, even though doing a hundred times that which ought not to be done."[4] "Perpetuated offspring, and heavenly abode, are obtained through a son, a grandson, and a great-grandson; therefore, should virtuous wives be respected, cherished, and well guarded."[5] "When good women, united with husbands in expectation of progeny, eminently fortunate and worthy of reverence, irradiate the houses of their lords, between them and goddesses of abundance, there is no diversity whatever.[6] Married women must be honored and adorned by their fathers and brethren, by their husbands, and by the brethren of their husbands, if they seek abundant prosperity."[7]

Duties of a wife to her husband.

Him, to whom her father has given her, or her brother with the paternal assent, let her obsequiously honor, while he lives; and when he dies, let her never neglect him. Though inobservant of approved usages, or enamoured of another woman, or devoid of good qualities, yet a husband must be constantly revered as a god by a virtuous wife. No sacrifice is allowed to women apart from their husbands, no religious rite, no fasting: as far only as a wife honors her lord, so far is she exalted in heaven. She must always live with a cheerful temper, with good management in the affairs of the house, with great care of the household furniture, and with a frugal hand in all her expenses.[8] Dwelling in a house, *as a householder*, is practised for the sake of happiness, and that happiness depends principally on the wife; she is indeed a wife, who is attentive to precept, obedient to command, and obsequious *to her lord;* who never speaks unkindly, who is careful in household management, virtuous, and prolific: a woman endued with such qualities, is no doubt a goddess of abundance. She whose temper is cheerful, who is ever attentive to her place, respectful and affectionate to her husband, is truly a wife; any other is useless.[9] An affectionate well-wisher to her lord, strict in her conduct, keeping her senses in subjection, she acquires renown in this world, and, after her death, the highest abode.[10] But she who is faithful to her lord, from the moment when she is given in marriage, through the whole period

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3 MANU, Chap. IX, *vs.* 1, 95.
4 *Coleb.* Dig., Vol. III, p. 406.
5 YÁJNAVALKYA, 2 Dig., 400.
6 MANU, Chap. IX, *v.* 26.
7 MANU, Chap. III, *v.* 55.
8 MANU, Chap. V, *vs.* 150, 151, 154, 155.
9 DAKSHA cited in 2 Dig., 410, 411.
10 *Smriti* quoted in the *Ratnákara*. *Vide Coleb.* Dig., Vol. II, p. 427.

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of her life, acquires the same abode with her husband, even as ARUNDHATÍ *attained a heavenly mansion.*[1] While she, who slights not her lord, but keeps her mind, speech, and body, devoted to him, attains his heavenly mansion, and by good men is called *sádhwí* or *virtuous.*[2] Dependence, attendance on her husband, aid in his religious ceremonies, respectful behaviour to those who are entitled to veneration from him, hatred to those who bear enmity to him, no ill-will towards him, constant complacency, attention to his business, are the duties of women.[3] VISHNU after premising 'duties of women:'—Accompanying of her husband, reverence of his father, of spiritual parents, of deities and guests, great cleanliness in regard to the domestic furniture, and care of the household vessels; avoiding the use of philters and charms, attention to auspicious customs, austerities after the death of her husband, no frequenting of strange houses, no standing at the door or window, dependence in all affairs, subjection to her father, husband, and son, in childhood, youth, and age: *such are the duties of a woman.*[4] The production of children, the nurture of them when produced, and the daily superintendence of domestic affairs, are peculiar to the wife.[5]

Restraint of wife's liberty.

Day and night must women be held by their protectors in a state of dependence; but in *lawful and innocent* recreations, though rather addicted to them, they may be left at their own disposal. Their fathers protect them in childhood; their husbands protect them in youth; their sons protect them in age: a woman is never fit for independence. Women must, above all, be restrained from the smallest illicit gratification; for, not being thus restrained, they bring sorrow on both families.—Let husbands consider this as the supreme law, ordained for all classes; and let them, how weak soever, diligently keep their wives under lawful restrictions; for he, who preserves his wife *from vice*, preserves his offspring *from suspicion of bastardy*, his ancient usages *from neglect*, his family *from disgrace*, himself *from anguish*, and his duty *from violation.*—No man, indeed, can wholly restrain women by violent measures; but, by these expedients, they may be restrained:—"Let the husband keep his wife employed in the collection and expenditure of wealth, in purification and female duty, in the preparation of daily food, and the superintendence of household utensils.—By confinement at home, even under

1 MANU. See *Coleb.* Dig., Vol. II, p. 442.
2 MANU, Chap. V, v. 165. 3 DEVALA. *Coleb.* Dig., Vol. II, p. 428.
4 *Vide Coleb.* Dig., Vol. II, p. 428. 5 MANU, Chap. IX, v. 27.

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affectionate and observant guardians, they are not secure; but those women are truly secure, who are guarded by their own good inclinations.—Drinking *spirituous liquor*, associating with evil persons, absence from her husband, rambling abroad, unseasonable sleep, and dwelling in the house of another, are six faults which bring infamy on a married woman."—MANU, Chap. IX, *vs.*, 1—3, 5—7, & 10—13.

Reciprocal duties of the married couple.

"In whatever family the husband is contented with his wife, and the wife with her husband, in that house will fortune be assuredly permanent.[1]—Let mutual fidelity continue till death:" this, in few words, may be considered as the supreme law between husband and wife.—Let a man and woman, united by marriage, constantly beware, lest, at any time disunited, they violate their mutual fidelity.—Thus has been described to you the law, abounding in the purest affection, for the conduct of man and wife.[2]—It is a crime in them both, if they desert each other, or if they persist in mutual altercation, except in the case of adultery by a guarded wife.[3]

DUTY OF THE HUSBAND GOING ABROAD TO HIS WIFE, AND OF HIS WIFE TO HIM.

Vyavasthá. **240. A husband going abroad is to assure a fit maintenance to his wife, but even if he live abroad without settling her maintenance, she cannot desert him, nor is she warranted to act so that it may render her fit to be deserted.***

Authority.

MANU:—Should a man have business abroad, let him assure a fit maintenance to his wife, and then reside (for a time) in a foreign country; since a wife, even though virtuous, may be tempted to act amiss, if she be distressed by want of subsistence.—While her husband, having settled her maintenance, resides abroad, let her continue firm in religious austerities; but, if he leave her no support, let her subsist by (spinning and other) blameless arts.—If he live abroad on account of some sacred duty, let her wait for him eight years; if on account of knowledge or fame, six; if on account of pleasure, three: (after those terms have expired, she must follow him).—Chap. IX, *vs.* 74—76.

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1 MANU, Chap. III, *v.* 60. 2 MANU, Chap. IX, *vs.* 101—103.
3 NÁRADA, 2 Dig., 415.

* *Vide Coleb.* Dig., Vol. II, pp. 484, 472, & 386; and Stra. H. L., Vol. I, page 46.

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A husband absent on account of some sacred duty, such as executing the command of his spiritual preceptor, or the like, must be expected by his wife during eight years; after that term has expired, his wife must follow him, as directed by VASHISHTHA.*—*Vivâda-bhangârnava.*

VASHISHTHA:—The wife of a husband who lives abroad, must wait for him eight years; after that period she must follow him, (giving notice thereof to five persons)."*—*Ibid.* Authority.

FOR WHAT FAULT A WIFE MAY LAWFULLY BE DESERTED.

241. Marriage properly contracted by the performance of the nuptial rites, is indissoluble, and the reciprocal relation of the married pair endures even after the natural death of one or both of them.† *Vyavasthâ.*

MANU:—Neither by sale nor desertion can a wife be released from her husband: thus we fully acknowledge the law enacted of old by the lord of creatures.—Chap. IX, *verse* 46. Nevertheless,— Authority.

242. A husband may desert his wife, for a time or for ever, on account of her being wicked, addicted to brawls, to drinking spirituous liquors, wasting or embezzling all his property, following her own will, or departing in wrath on account of supersession; or for being insane, afflicted with a lasting or incurable disease, blemished, previously deflowered, barren, degraded from her class, or disloyal, or for destroying an embryo, attempting the life of her husband, or the like. *Vyavasthâ.*

MANU:—She, who neglects her lord, though addicted to gaming, fond of spirituous liquors, or diseased, must be deserted for three months, and deprived of her ornaments and household furniture.—For a whole year let a husband bear with his wife, who treats him with aversion; but, after a year, let him deprive her of her separate property, and cease to cohabit with her.—Even though a man have married a young woman in legal form, yet he may abandon her, if he find her blemished, afflicted with disease, or previously deflowered, and given to him with fraud.—If a wife, legally Authority.

* *Vide Coleb.* Dig., Vol. II, pp. 414, 423 & 472.

† See Post p. 411, 412 and *ante*, pp. 30—33.

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superseded, shall depart in wrath from the house, she must either instantly be confined, or abandoned in the presence of the whole family.—Chap. IX, *vs.* 72, 77, 78, & 83.

Authority. DEVALA:—A man may exclude from his bed, or from pilgrimage (for the term is explained in both senses), a wife who is afflicted with leprosy, degraded from her class, barren, or insane, whose courses are stopped, or who is wicked; but he may not exclude her from all business.—*Vivádabhangárnava.**

Authority. HÁRÍTA:—A man should avoid her who has destroyed an embryo, has criminally conversed with a man of low class, with a pupil, or with a son, is addicted to drinking or to brawls, or who wastes property or (stores of) grain.*—*Ibid.*

Authority. MANU:—That a woman who follows her own will should be forsaken, is ordained by the law; but let no man slay his wife, or mutilate her person. VIVASWAT declared that a woman wilfully disloyal should be forsaken, not slain, nor disfigured; a man should avoid the slaughter of a woman.*

Authority. VASHISHTHA:—From connubial intercourse, from pilgrimage, from what pertains to acts of religion, these four, should be rejected, (namely,) one who yields herself to her husband's pupil, or to his spiritual parent, and especially one who attempts the life of her lord, or who converses with the vilest (of men).*—*Ibid.*

Authority. NÁRADA:—Let a man banish from his house a wife who embezzles all (his) wealth under pretence of female property, or who procures an abortion, or who wishes the death of her husband.*—*Ibid.*

Authority. YÁJNAVALKYA:—From disloyalty *in thought* a woman may be purified by her courses; but in case of conception by unlawful commerce, desertion is enjoined by law; and so in the case of her destroying an embryo, or slaying her husband, or committing any sin in the first degree.*—*Ibid.*

The *Mahábhárata*:—Should her husband divorce† a woman to be wholly addicted to charms and philters, let him shun her, as he would a serpent which had crept into his house.*—*Ibid.*

Vyavasthá. **243.** Without any of the faults recognised by the law, as above, a wife must not be deserted.

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* See *Colebr.* Dig., Vol. II, pp. 414, 421—423 & 429.

† The original of the word "divorce" is "*tyágu*," which does not signify divorce in the sense in which it is understood in the English law, as such a thing is unknown to Hindú law, but simply desertion for a time or for ever.

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He who deserts a good or faultless wife, must be brought to his duty by the ruling power, or compelled to pay a third of his wealth, or, if poor, to provide a maintenance for her.

Vide Precedents, pages 401, 402.

DEVALA :—No atonement is ordained for that man who forsakes his own wife through delusion of mind, deserting (her) illegally; nor for him who forsakes a virtuous son.* Authority.

NÁRADA :—A husband who abandons an affectionate wife, or her who speaks not harshly, who is sensible, constant, and fruitful, shall be brought to his duty by the king with a severe chastisement.* Authority.

Viváda-bhangárnava.—A husband deserting a wife endued with excellent qualities, to connect himself with another wife and so forth, incurs a severe chastisement; that is, punishment of a thief: for on the subject of punishment of robbery, VISHNU says:—"The man who deserts a faultless wife, (shall suffer the same punishment)."* Authority.

YÁJNAVALKYA.—He who forsakes a wife, though obedient to his commands, diligent in household management, mother of an excellent son, and speaking kindly, shall be compelled to pay the third part (of his wealth), or, if poor (*a*), to provide a maintenance for that wife.* Authority.

(*a*) 'If poor, maintenance,'—that is, (the ruling power) should make him provide food, raiment, and the like.—*Mit. Achá.*, p. 13.

MANU.—But she, who is averse (*b*), from a mad husband, or a deadly sinner, or a eunuch, or one without manly strength, or one afflicted with such maladies as punish crimes (*c*), must neither be deserted, nor stripped of property.*—Chap. IX. *v.* 79. Authority.

(*b*) 'Who is averse'—that is, who attends not.—KULLÚKA-BHATTÁ.* Explanation.

Aversion from a husband.]—Want of diligent attention, not absolute desertion.*—JAGAN-NÁTHA. Explanation.

(*c*) Afflicted with such maladies as punish crimes.]—Afflicted with leprosy or a similar sinful disease.—See the Chapter treating of Exclusion from Inheritance. Explanation.

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* *Vide Coleb.* Dig., Vol. II, pp. 412, 413, 414, 420.

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WHAT HUSBAND MAY BE DESERTED.

Vyavasthá. **244.** A wife may desert her husband when he is an outcast, degraded, or civilly dead.*

Vide Precedents, pages 401, 402.

Authority. *Srímat-bhágavata.*—A husband, who is not an outcast, should not be forsaken by women desirous of happiness in another world.*

Conclusion. It being said that a husband, who is not degraded, should not be forsaken, it is implied that it is not incompetent to a wife to desert her husband when degraded.

Authority. DEVALA adds certain other circumstances under which also, according to him, a wife may desert her husband. They are as follow:—"A husband may be forsaken by his wife, if he be an abandoned sinner (*d*), or a heretical mendicant, or impotent, or degraded, or afflicted with phthisis (*e*), or if he have been (long) absent in a foreign country" (*f*).†—*Viváda-bhangárnava.*

Explanation. (*d*) Abandoned sinner.] Expelled; in the legal form, from virtuous intercourse.†—*Ibid.*

Explanation. (*e*) Afflicted with phthisis.] Suffering under the disease called phthisis.†—The *Ratnákara.* See *Ibid.*

Explanation. (*f*) If he be absent in a foreign country.] If he have gone to a foreign region.†

Authority. PARÁSHARA:—"If the husband be missing, dead, quit the condition of a householder, be impotent, or degraded,—in (any of) those five calamities, it is lawful for a woman to have another husband."‡

Conclusion. Thus PARÁSHARA having declared it lawful for a woman to take another husband in case her (former) husband be in one

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* *Vide Coleb.* Dig., Vol. II, pp. 413, 470, and Post, p. 211.

Sir William Macnaghten says,—"Insanity, impotence, and degradation, are, perhaps, the only circumstances, under which her (a wife's) desertion of her husband would not be considered as a punishable offence." It does not, however, appear from any text-book that a husband's insanity is a justifiable ground for his wife's deserting him. The text of MANU (cited in Colebrooke's Digest, Vol. II, p. 412), which is referred to by the learned writer as authority for the above opinion, speaks of *aversion* from a husband who is mad, degraded, a eunuch, impotent, or afflicted with leprosy or the like disease; and KULLÚKA-BHATTA interprets the phrase 'She who is averse from a husband,' by 'She who attends not a husband.' JAGAN-NÁTHA (author of the original of the aforesaid Digest), follows KULLÚKA, and thus interprets the phrase: 'aversion' 'want of diligent attention, not absolute desertion.'

† *Vide Coleb.* Dig., Vol. II, pp. 413 & 470.

‡ Chapter IX, *verse* 46.

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of the said circumstances, then *á fortiori*, it must be inferred that according to his doctrine a woman may desert her husband when so circumstanced.

The opinion universally approved of, however, is that a husband who is degraded, or an outcast, may be deserted with impunity. Remarks.

But although a married pair can desert each other under the circumstances above noticed, yet desertion does not render their marriage dissolved; for MANU says:—"Neither by sale nor desertion can a wife be released from her husband: thus we fully acknowledge the law enacted of old by the lord of creatures." (*Ante*, p. 207.) Nor is the marriage dissolved by the natural death of either of them, for then the person surviving, if without a son, must, as widow or widower of the deceased, perform the funeral obsequies, and continue to offer the oblation of food and libation of water to the *manes* of the deceased periodically and annually, as prescribed by the law, and if there be a son, the survivor is still enjoined by the law to offer the libation of water to the *manes* of his or her deceased consort.* In the case of civil death also, the relation of husband and wife is not absolved, for if both of them be so circumstanced, they are still husband and wife; if one only, he or she, though then separated from, or deserted by, the other, can join the other either in the degraded state (in which case they both are degraded as *civiliter mortuus*),† or after being purified by expiation: on the other hand, the person who was not civilly dead, can join the other, who is so, sharing his or her fate; and in all of these (latter) three cases, the dormant relation is revived. But the circumstance of one of the married couple refusing to associate with his or her degraded spouse,‡ or that of the other dying in the state of degradation unatoned for, and the surviving one remaining pure at that time, is the only one that causes absolute dissolution of their marriage, or the relation of husband and wife; as then, and then only, ceases entirely all connection of the deceased with the survi- Remarks.

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* See *ante*, pages 30—33.

† Change of religion in either spouse effects desertion by the other, as the converted spouse is regarded by the Hindú law as degraded or civilly dead. Accordingly, it has been held in Muchoo *v.* Arzoon Sáhoo (5 W. R., 235) that a Hindú husband who has been repudiated by his wife on his conversion to Christianity cannot sue for the restitution of society.

‡ Act XXI of 1866 has provided for dissolution of marriage when either spouse becomes converted to Christianity. It authorizes the converted spouse to sue for conjugal society, and it gives the latter the option of agreeing or refusing to cohabit with the former, and in the case of refusal on the ground of change of religion, the law directs the Court to declare the marriage dissolved.

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vor, who in that case is not to perform the deceased's funeral obsequies nor to offer periodically and annually the oblation of food and libation of water to his or her *manes*. Thus SHÁNKHA and LIKHITA:—"Of him who has been formally degraded, the right of inheritance, the funeral cake, and the libation of water, are extinct."—The *Brahma-purána*, too, says: "Of degraded persons there shall be no cremation, nor funeral sacrifice, nor gathering of their bones."*

Conclusion. Thus the circumstance of one of the married couple refusing to associate with his or her degraded spouse, or the other dying in the state of degradation attended with loss of caste unredeemed by penance, is the only one which would be tantamount to divorce, provided the surviving consort can be allowed to marry.

Remark. Among the low-caste Hindús, perpetual separation between husband and wife is effected, and they are allowed to marry others by the caste-brethren; but this is done according to the usage of the country or caste, and not according to the *Shástra*.

Vide Precedents, pages 398, 400.

ADULTERY.

Vyavasthá. Adultery is a criminal offence, not a civil one. Consequently,—

Vyavasthá. **245.** An action for damages, brought by the husband of the adulteress, against the adulterer, will not lie; but an action by him is cognizable, if brought for punishment of the adulterer.†

Vyavasthá. **246.** The ruling power, however, can impose a pecuniary fine with or without corporal punishment according to peculiar circumstances.†

Vide Precedents, pages 403, 404.

The effects of adultery will be seen in the Chapter treating of Exclusion from Inheritance.

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* See *Coleb* Dig., Vol. III, pp. 300 and 313.

† See Macn. H. L., Vol. I, p. 61.

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CHAPTER II.

ON STRI'-DHANA OR WOMAN'S SEPARATE PROPERTY.

SECTION I.

ON THE DIFFERENT DESCRIPTIONS OF STRÍ-DHANA.

247. Property given to a woman—before the nuptial fire (*adhyagni*),—in the bridal procession (*adhyáváhanika*),—on her husband's espousal of another wife (*ádhivedanika*), property given her after marriage (called *anwádheya* or gift subsequent),—property given in token of love (*príti-datta*),—property given by her father or his relatives, by the mother or her relatives, by the husband or his relatives (*soudáyika* or *bandhu-datta*);—property gained by loveliness;—her subsistence, ornaments, fee or perquisite (*shulka*), gains, and whatever is given to the husband intending the benefit of the woman—are (her) *stri-dhana* or separate property. *Vyavasthá.*

Vide Precedents, pages 403—421.

MANU and KÁTYÁYANA:—What was given before the nuptial fire, what was presented in the bridal procession, what has been conferred on the woman through affection, and what has been received by her from her brother, her mother, or her father, are denominated the six-fold property (1) of a woman.* Authority.

NÁRADA:—What was given before the nuptial fire, what was presented in the bridal procession, her husband's donation (*a*), and what has been given by her brother or by either of her parents, is termed the six-fold property (1) of a woman.* Authority.

Annotations.

(1) The enumeration of six sorts of woman's property by MANU [as above] is intended not as a restriction of a greater number, but as a denial of a less.—*Mit.* In., Chap. II, Sec. xi, § 4.

Six kinds of property means that there cannot be a less number. *Vi. Chi.*, p. 257.

Six-fold is here used in order to prevent [its reduction to] a smaller number, [a position] which is borne out by the word "*other*" in the following text of YÁJNAVALKYA: "What was given to a woman by the father, the mother, the husband, or a brother, or

* *Dá. Bhá.*, Chap. IV, Sect. i, § 4. *Dá. Kra. Sang.*, Chap. II, Sect. i, § 1.

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Definition. *(a)* "Her husband's donation (*dáya*)" is wealth given *(datta)* to her by her husband; (not, as the word might be supposed to signify, the heritage of her husband). For MANU and others notice that which is given *(datta)* to her by him, without mentioning his donation *(dáya)*, and NÁRADA specifies donation (*dáya*) without any separate notice of (that which is) given *(datta)*. In other instances also, 'husband's donation' is used for wealth given by the husband. Thus KÁTYÁYANA says: "Let the woman place her husband's donation as she pleases, when he is deceased: but, while he lives, she should carefully preserve it, or else [if unable to do so] commit it to the family." So the text of VYÁSA, concerning the limits of the value which may be given by her husband, [exhibits the same term]: "A present, amounting to two thousand (*panas*) at the most, may be given to a woman, out of the wealth; and whatever property is given to her by her husband, let her use as she pleases."—*Dá. Bhá.*, Chap. IV, Sect. i, § 7.

Remark. Here the number six must not be considered as restrictively used; since it will be hereafter declared that woman's peculiar property is of many descriptions.—*Dá. Kra. Sang.*, Chap. II, Sect. ii, § 2.

This will appear from some of the following texts:—

Authority. VISHNU:—"What has been given to a woman by her father, her mother, her son, or her brother, what has been received by her before the nuptial fire, what has been presented to her on her husband's espousal of another wife (*b*), what has been given to her by kindred (*c*), as well as her perquisite (*d*), and gift subsequent (*e*), are a woman's separate property.

Explanation. *(b)* Wealth which is given to gratify the first wife by a man desirous of marrying a second, is a gift on the second marriage; for its object is to obtain another wife (with the assent of the first).—*Dá. Bhá.*, Chap. IV, Sect. i, § 14.

Exposition. *(c,e)* The term 'kindred,' in the (above) text of VISHNU, intends maternal uncles and others: for the father and the rest are specified by the appropriate terms. But by the word 'kindred' (in the other texts regarding *stri-dhana*,) her father and mother are denoted. Hence the meaning is this; anything received *subsequently* to the marriage, from (maternal or paternal uncles or other) persons who are related through the father or the

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Annotations.

received by her at the nuptial fire [*adhyagni*], or presented on her supersession [*ádhivedanika*], as also any other [separate acquisition], is denominated a woman's property.—*Vyav. Mayú.*, Chap. IV, Sect. x, § 2.

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mother, or from those two parents themselves; or so received from the husband, or from his family, namely, her father-in-law and the rest; is a gift subsequent *(anwádheya)*.—See *Dá. Bhá.*, Chap. IV, Sect. i, § 3.

KÁTYÁYANA:—"What is given to women at the time of their marriage (*f*), near the nuptial fire, is celebrated by the wise as the women's peculiar property bestowed before the nuptial fire. That, again, which a woman receives while she is conducted from the paternal (abode to her husband's dwelling), is instanced as the separate property of a woman, under the name of gift presented in the bridal procession."(*g*)* Authority.

(*f*) 'The time of their marriage,'—that is, the time occupied by the ceremony, commencing with the performance of the funeral obsequies for departed ancestors, and concluding with the (bride's) *abhi-váda* (prostration) at the feet of her husband. Property received during this time is denominated *youtaka* or *joutaka* (marriage-present), conformably to the meaning of the root '*yu*, or *ju*,' which signifies to mix, and the mixture here alluded to, is that which results from the union by marriage of the man and woman, who become as it were one and the same body. The following passage of scripture which declares: "Her bones become identified with his bones, flesh, with flesh, skin, with skin."—*Dá. Kra. Sang.*, Chap. II, Sect. ii, § 3. Exposition.

(*g*) Since the term "paternal" is derived from a complex expression, of which one member only is retained, the presents, which she receives from the family of either her father or her mother, while she is conducted to the house of her husband, are gifts presented in the bridal procession.* Exposition.

KÁTYÁYANA:—Whatever has been given to her through affection by her mother-in-law or by her father-in-law, or has been offered to her as a token of respect, is denominated an affectionate present (*príti-datta*). That which is received by a married woman or by a maiden in the house of her husband, of her father, from her brother, from her parents, is termed gift of affectionate kindred. [*soudáyika*]. See *Mit.* Inh., Chap.II, Sect. xi, § 5. Authority.

YÁJNYAVALKYA:—What has been given to a woman (before or after her nuptials), by the father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, is denominated a woman's property."* Authority.

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* *Dá. Bhá.*, Chap. IV, Sect. i, § 5, 6, 13. See *Dá. Kra. Sang.*, Chap. II, Sect. i, § 2.

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Definition. KÁTYÁYANA defines a 'gift subsequent.'—What has been received by a woman from the family of her husband, at a time posterior to her marriage, is called a gift subsequent; and so is that which is similarly received from the family of her kindred (*h*). Whatever is received by a woman after her nuptials, either from her husband or from her parents, through the affection of the giver, BHRIGU pronounces to be a gift subsequent.*

Exposition. (*h*) From the family of her kindred.]—Here by the term "kindred" her father and mother are (also) intended. Therefore any thing received after the marriage from persons related through her husband, such as her father-in-law and others, or from persons related through the father and mother, namely, maternal and paternal grandfathers, is termed a gift subsequent. Such is the meaning of the first text; and the meaning of the second text is that any thing received posterior to the marriage, either from her husband, or from her parents, is also termed *a gift subsequent.**

Authority. (*d*) KÁTYÁYANA describes the perquisite or fee:—"Whatever has been received as a price of workmen on houses, furniture,[1] beasts of burden,[2] milch animals,[3] and ornaments, is denominated a fee or perquisite.[4]*

Authority. VYÁSA also:—That which is given to bring the bride to the family of her husband is her perquisite; which is given as a bribe or the like, that she may cheerfully go to the mansion of her lord.—*Coleb.* Dig., Vol. III, p. 570.

Authority. KÁTYÁYANA:—Any thing which is given to a woman by the mother or father of her husband in token of affection, and that which is given in return of her humble salutations, is called wealth gained by loveliness.—*Ibid.*, p. 562.

DEVALA:—Her subsistence (*i*), her ornaments, her perquisite (*d*), and her gains [*lábha* (*j*)], are the separate property of a woman. She herself exclusively enjoys it; and her husband has no right to use it, unless in distress.†

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* *Dá. Kra. Sang.*, Chap. II, Sect. ii, § 17, 20—22.

(1) '*Furniture*,'—brooms, &c.—*Ibid.*, § 18.

(2) '*Beasts of burden*,'—bullocks, &c.—*Ibid.*

(3) '*Milch animals*,'—milch cows, &c.—*Ibid.*, p. 33.

(4) That is termed a fee (or perquisite) which a woman receives from others as a douceur for influencing her husband, an architect or other description of artist, to expedite the completion of their business, such as the construction of a house or other kind of work. It is the price in fact which she receives for sending her husband (to the employment).—*Ibid.*, § 17.

† Coleb. *Dá. Bhá.*, Chap. IV, Sect. i, § 15. *Dá. Kra. Sang.*, Chap. II, Sect. ii, § 16.

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(*i*) "Subsistence."] — Food and raiment. — *Dá. Kra. Sang.*, Chap. II, Sect. i, § 16.

(*j*) Gains.]—Interest on loans and so forth.—Commentary on the *Dáya-bhága* by CHÚDÁ-MANI, SRÍ-KRISHNA, and others. Explanation.

(*j*) Gains.]—Treasure discovered, &c.—SRÍ-KRISHNA. Vide *Dá. Kra. Sang.*, Chap. II, Sect. iv, § 16. Explanation.

(*j*) *Lábha.*]—That which is gained is '*lábha.*'—(*Labhyate iti lábha.*)—*Smri. Chan.*, Chap. IX, Sect. ii, Cl. 15. Explanation.

VYÁSA :—" Whatever is presented at the time of the nuptials (*k*) to the bridegroom, intending [the benefit of the bride, (*l*)] belongs entirely to the bride, and shall not be shared by kinsmen."—*Dá. Bhá.*, Chap. IV, Sect. ii, § 16. Authority.

(*k*) The expression—" before the nuptial fire," occurring in the text (of KÁTYÁYANA) before cited (p. 215), and that "at the time of the nuptials," in the text above quoted, are both illustrative.* Since whatever is delivered in the hand of the bridegroom intending the benefit of the bride becomes hers, such intention must therefore be considered as the foundation of her property therein. The mention therefore of "the bridegroom" must be taken figuratively, for wealth delivered into the hand of any other with that intention would equally become the exclusive property of the bride.—*Dá. Kra. Sang.*, Chap. II, Sect. ii, § 7. Exposition.

(*l*) Intending.] Designing, that it shall appertain to the bride. It is not meant that the property becomes hers, even without such intention. Accordingly the time of nuptials is here stated illustratively, and not as the sole motive. For the will of the giver is the cause of property. So the following authentic text does not specify, that it must be at the time of the nuptials.—" What is presented to the husband of a daughter, goes to the woman, whether her husband live or die, and, after her death, descends to her offspring." Here the giver's intention is not specified, because it is implied by the word "daughter."—*Dá. Bhá.*, Chap. II, Sect. ii, § 17. Exposition.

ÁPASTAMBA :—Ornaments are the exclusive property of a wife, and so is wealth given to her by her kinsmen or friends, according to some (legislators).† Authority.

MANU and VISHNU :—Such ornamental apparel as women wear during the lives of their husbands, the heirs of those husbands shall not divide among themselves; they who divide it among themselves fall deep (into sin).† Authority.

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* *Vide* Precedents, pages 405.
† *Coleb.* Dig., Vol. III, pp. 570, 571.

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Authority. The whole of the ornaments worn by a wife with the assent (*m*) of her husband is her own (property), although they were not given by the husband.—*Medhátithi* cited by RAGHU-NANDANA.—See *Dá. Ta.*, Sans., p. 41.

Exposition. (*m*) The assent of her lord is indispensably necessary; and it is also requisite that this apparel should have been the several property of her husband, as declared by MANU:—"A woman should never make a hoard from the goods of the kindred (which are) common to (her and) many; or even from the property of her lord, without his assent."—*Coleb.* Dig., Vol. III, pp. 570,571. Consequently,—

Vyavasthá. **248. Ornaments or the like given to a woman on condition that they are to be worn only on occasions of festivals, &c., as well as property given with a view of defrauding the co-heirs, will not constitute *stri-dhana* or separate property of a woman.*—See *Vyavasthá* 260.**

Authority. KÁTYÁYANA thus declares:—But whatever has been given conditionally or with a fraudulent design by the father, brother, or husband, is declared not to be *stri-dhana* or woman's property.*

Vyavasthá. **249. Property purchased by a woman with her *stri-dhana*, as well as the income thereof, is her *stri-dhana*.**

Vide Precedents, pages 420,424.

Reason. Because the property so purchased, though in a different shape, represents the *stri-dhana* with which it was bought.

Annotations.

248. But in property given to a woman with a view of cheating the heirs out of it, as well as ornaments, or the like, given to her merely for the purpose of wearing, a woman has no ownership (or property); for thus says KÁTYÁYANA: "But whatever has been given to women with a fraudulent design, or entrusted to them for use, by their father, brother, or their husband, is declared not to be women's property (*stri-dhana*)."—*Vyav. Mayú.*, Chap. IV, Sect. x, para. 6.

* Vide *Smri. Chan.*, Chap. IX, Sect. i, cl. 11;—*Vyav. Mayú.*, Chap. IV, Sect. x, § 6.

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Some writers consider that the immoveable property given to a woman by her husband does not constitute her *strí-dhana*, for the simple reason of her not being competent to alienate it without the consent of her husband during his life, and at pleasure even after his death. But although such property cannot, for the above reason, be held to be the woman's *absolute strí-dhana* or *peculium*, yet when it does not cease to belong to the woman, and its course of descent is the same as that of any *strí-dhana*, it cannot be excluded from the category of such property, but is to be regarded as *strí-dhana* with restrictions.—See post, pp. 222,223. Remark.

"The wealth which is earned by mechanical arts, or which is received through affection from others (*k*), is always subject to her husband's dominion. The rest is pronounced to be the woman's property (*strí-dhana*)."—KÁTYÁYANA cited in *Smri. Chan.*, Chap. IX, Sect. i, cl. 16, &c.

Upon the authority of the above text, SRÍ-KRISHNA, DEVÁNANDA BHATTA, and some other authors, hold that the wealth which a woman receives through affection from strangers, as well as that which she earns by mechanical arts, is not her *strí-dhana*. But although such property be subject to the husband's dominion, and he be competent to take it even without distress or without her consent, yet the same does not cease to belong to her, nay, its devolution is regulated by the rules respecting *strí-dhana* in general. The above text, therefore, must be expounded thus:—"Wealth which is earned by mechanical arts, or received through affection from others, is subject to the husband's control, but still it constitutes *strí-dhana*, though not uncontrolled or absolute, as the rest is."—*Vide* Precedents, pp. 415—425. Exposition.

Although, according to the *Achára-kánda** of the Hindú law, the woman who burned herself with the body of her husband is taken to have died at the time with her husband, and the *shráddhas* of both of them are simultaneously performed, yet, according to the *Vyavahára-kánda** of that law, her death is held to have occurred after that of her husband, she having actually died after him, and any gift, &c., made by her after her husband's death, being good and valid under the idea of her being then alive and in possession of her senses. Consequently,— Remark.

* See Preface, page 1.

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Vyavasthá. **250.** Whatever is given to her by the husband, on condition of the same being her property from the moment of his death, becomes her *strí-dhana* at the time mentioned, and devolves after her death on the heirs of her *strí-dhana.*

Vide Precedents, page 410.

Remark. Since various sorts of separate property of a woman have been thus propounded without any restriction of number, the number of six (as specified by MANU and others) is not definitely meant. But the texts of the sages merely intend an explanation of woman's separate property.—*Dá. Bhá.*, Chap. IV, Sect. i, § 18.

Vyavasthá. **251.** *Strí-dhana* inherited by a woman ceases be *her strí-dhana,* but is treated as the property which devolves under the ordinary rules of inheritance, and, as such, it descends after her death on the heir of the former owner.

Vide Precedents, pages 411—415.

Authority. On the death of a maiden daughter, or of one affianced, in whom the succession (to the *strí-dhana*) had vested, and who, having been subsequently married, is ascertained to have become barren, or a widow without giving birth to a son, the property which has passed to her from the mother *as an inheritance* would devolve next on the sisters, having, and likely to have, male issue, and in their default, on the barren and widowed sisters,—not on the husband of such daughter (as above mentioned, in whom the succession had vested). For the right of the husband is relative to the *woman's separate* property, and wealth which has in this way passed from one to another, being ancestral property that has descended by inheritance, can no longer be considered as the "*woman's separate property.*"*—See *Dá. Kra. Sang.*, Chap. II, Sect. iii, § 6.

Annotations.

251. It may be here observed that *strí-dhana,* which has once devolved according to the law of succession which governs the descent of this peculiar species of property, ceases to be ranked as such, and is ever afterwards governed by the ordinary rules of inheritance.—Macn. H. L., Vol. I, p. 38.

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* The above passage slightly differs from Mr. Wynch's translation of the *Dáya-krama-sangraha,* which does not appear to be an accurate and faithful one of the Sanskrit text, contained in his own edition as well as in the other editions of the work.

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SECTION II.

DOMINION OF A WOMAN OR HUSBAND OVER HER STRÍ-DHANA.

252. The husband has dominion over that property which his wife has obtained from any person other than the kindred of her husband, of her father, or mother, and also over that which she has earned by the exercise of art. The husband can take such property even without her consent or the occurrence of any distress. *Vyavasthá*

Vide Precedents, pages 424, 425.

KÁTYÁYANA:—The wealth which is earned by mechanical arts, or which is received through affection from any other (but the kindred), is always subject to her husband's dominion. The rest is pronounced to be the woman's property.*—*Dá. Bhá.*, Chap. IV, Sect. i, § 19. Authority.

Over that which has been received by her from 'any other' (*a*), but the family of her father, mother, or husband, or has been earned by her in the practice of a mechanical art (as spinning or weaving), her husband has dominion and full control. He has a right to take it even if no distress exist. Hence, though the goods be hers, they do not constitute woman's property, because she has not independent power over them.—*Ibid.*, § 20. Exposition.

RAGHU-NANDANA gives almost the same exposition of the above text of KÁTYÁYANA.—Vide *Dá. Ta.*, Chap. IX, § 1.

Therefore, notwithstanding the woman has ownership in both descriptions of property, she has not independent power in regard to it; on the contrary, it appearing from the text that her husband has authority over such property, his permission authorizing the disposal of it must be obtained by the woman.—*Dá. Kra. Sang.*, Chap. II, Sect. ii, para. 29. Conclusion.

(*a*) "*From any other*:" in that which is received from any but the kindred of her father, mother, or husband, and in that which is acquired by arts, her husband has ownership, and has independent power over it, that is, he may with propriety seize it, even though suffering no distress. Hence, though it belonged to the woman, it is not her separate property *in contemplation of law*, for she is not independent.—*Coleb.* Dig., Vol. III, p. 567. Exposition.

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* Vide *Dá. Ta.*, Chap. IX, § 1;—*Dá. Kra. Sang.*, Chap. II, Sect. ii, § 25;—*Coleb.* Dig., Vol. III, p. 566.

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Vyavasthá. **253.** Save and except the wealth of the above descriptions, and that which has been given to her by her husband, a woman has independent power over the other kinds of her property which are her absolute *strí-dhana*, and which she can alienate at pleasure independently of her husband and the rest.

Vide Precedents, pages 415, 417, 419—424.

Authority. But a woman's right is complete in other descriptions of property, excepting these two; for she has the sole power of gift or other alienation.—*Dá. Ta.*, Chap. IX, § 1.

But in other descriptions of property, excepting these two, the woman has the sole power of gift, sale or other alienation. So*—

Authority. KÁTYÁYANA :—That which is received by a married woman, or a maiden, in the house of her husband (*b*), or of her father, from her brother, or from her parents, is termed the gift of affectionate kindred (*a*). The independence of women, who have received such gifts, is recognised in regard to that property, for it was given by their kindred to soothe them, and for their maintenance. The power of women over the gifts of their affectionate kindred is ever celebrated, both in respect of donation and of sale according to their pleasure, even in the case of immoveables (*c*).

Explanation. (*b*) What is obtained from kind relations, that is, persons of her father's, mother's, or husband's family, is the gift of her affectionate kindred.—*Dá. Bhá.*, Chap. IV, Sec i, § 22.

Explanation. (*b*) That which is receivied by a married woman from the family of her husband, or from the family of her parents, and by a damsel from the family of her parents, is the '*gift of affectionate kindred* (*soudáyíkam*).' Such is the meaning.—*Dá. Kra. Sang.*, Chap. II, Sect. ii, § 30.

Authority. What is obtained from kind relatives of her father, mother or husband, is called the gift of affectionate kindred. "To soothe them," that is, out of kindness towards them.—*Dá. Ta.*, Chap. IX, § 3.

Explanation. (*c*) "*Even in the case of immovables,*" relates to immoveable property other than that which has been bestowed

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* *Dá. Bhá.*, Chap. IV, Sect. i, § 21.

† *Dá. Bhá.*, Chap. IV, Sect. i, § 21. See *Dá. Ta.*, Chap. IX, § 3; and *Dá. Kra. Sang.*, Chap. II, Sect. ii, § 26.

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upon her by her husband, for a prohibition exists against the gift or sale by a woman in regard to immoveable property given to her by her husband.—*Dá. Kra. Sang.*, Chap. II, Sect. ii, § 31. Consequently,—

254. Even after her husband's death, a woman is incompetent to dispose of, by gift, sale, or the like, the immoveable property given to her by her husband. *Vyavasthá.*

Vide Precedents, pages 415, 417, 419, 420, 424, 425.

But in the case of immoveables bestowed on her by her husband, a woman has no power of alienation by gift or the like. So NÁRADA declares: "What has been given by an affectionate husband to his wife, she may consume as she pleases when he is dead, or may give it away, excepting immoveable property."* Authority.

It follows from the specific mention of 'given by a husband;' that any other immoveable property, except such as has been given to her by him, may be aliened by her. Else (if this text forbid donation in the case of immoveables in general), the preceding passage concerning the power of women in respect of donation and of sale, 'according to their pleasure, even in the case of immoveables,' would be contradicted.—*Dá. Bhá.*, Chap. IX, Sec. i, § 23. Exposition.

From the adjective "given by the husband" it appears that immoveable property other than that given by the husband may of course be given away. Otherwise, it would be contradictory to what KÁTYÁYANA said:—"According to their pleasure, even in immoveables.—*Dá. Ta.*, Chap. IX, para. 4. Exposition.

By the words 'as she pleases' used in the above text of NÁRADA, the liberty of the woman over property other than immoveables is shown. Consequently,—

255. As regards the moveable property given by a husband, a woman is enjoined carefully to preserve it, or, if unable to do so, to commit it to the family, so long as the husband lives, but after his death, she is at liberty to dispose of it as she pleases. *Vyavasthá.*

Vide Precedents, pages 417, 418, 419.

* *Dá. Bhá.*, Chap. IV, Sec. i, § 23.—*Dá. Ta.*, Chap. IX, § 4.—*Dá. Kra. Sang.*, Chap. II, Sect. ii, § 31.

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Authority. KÁTYÁYANA :—Let the woman place her husband's donation as she pleases, when he is deceased, but while he lives, she should carefully preserve it, or else, (if unable to do so,) commit it to the family.*

Remark. A caution against a woman's profusion, during her husband's life, of the property given to her by her husband being announced by the text—"But while he lives, she should carefully preserve it, or else commit it to the family," and the text of NÁRADA (above cited) perpetually prohibiting alienation of immoveable property only given by a husband, it necessarily follows that, after her husband's death, a woman has power over the moveable property given to her by him.

KÁTYÁYANA has, in the following text, declared the husband (and the rest) to have no right to the use of the woman's separate property :—

Vyavasthá. **256.** "Neither the husband, nor the son, nor the father, nor the brothers, can assume the power over a woman's property to take it or to bestow it. If any one of these persons by force consume the woman's property, he shall be compelled to make it good with interest (*d*), and shall also incur a fine. If such person, having obtained her consent, use the property amicably, he shall be required to pay merely the principal (*e*) when he becomes rich. But if (*f*) the husband have a second wife, and do not show honor to his first wife, he shall be compelled by force to restore her property, though amicably lent to him (1). If food, raiment (*g*), and dwelling (*h*), be withheld from the woman, she may exact her own (*i*), and take a share (of the estate) with the co-heirs (*j*)."*

Vide Precedents, pages 417, 418, 421.

Exposition. (*d*) '*Make it good with interest,*'—that is, woman's separate property taken by force must, in the form of a loan, be rendered with interest: the words 'with interest (*sa-vriddhi*)' must not be supposed as discriminative of '*stri-dhana* (the woman's separate property);' for supposing this to be the case, *sa-vriddhi* would be the proper form in which the word would appear.—*Dá. Kra. Sang.*, Chap. II, Sect. ii, § 36.

* Coleb. *Dá. Bhá.*, Chap. IV, Sect. i, § 7.—*Dá. Kra. Sang.*, Chap. II, Sect. ii, § 10, 35.—*Coleb*, Dig., Vol. III, pp. 574—576.

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(*e*) "*Merely the principal.*"—Here the insertion of the word "merely" is intended to preclude (the payment of) interest.* Explanation.

(*f*) '*But if,*' *&c.*—The meaning of which is, that if the husband, after making use of the separate property of one wife, reside with another wife, and neglect the former, he shall be compelled by the ruling power to restore such property, even though it had been amicably lent.* Explanation.

(*g*) '*Food and raiment.*'—Should the husband not allow his wife the necessaries of life, food, and clothing, then she may, if immaculate, require the supply of food and raiment which is her due.* Explanation.

(*h*) '*Dwelling,*'—place of residence.* Explanation.

(*i*) '*She may exact her own;*'—that is, her due supply of food and raiment.—SRÍ-KRISHNA'S Commentary on the *Dáya-bhága.*—Vide *Dá. Bhá.*, Chap. IV, Sect. i, § 24, Annotation. Explanation.

(*j*) '*A share,*'—that is, on the death of her husband, she is to receive from his co-heirs, his younger brother, and the rest, the share to which he was entitled. Explanation.

From its being mentioned that the principal is payable when he becomes rich, it is inferable that the re-payment of even the principal is not necessary in the case of a poor man. It also appears from re-payment of the principal being enjoined even where *strí-dhana* is used with permission, that the husband and the like are wanting not only in independent power, but also in ownership over *strí-dhana.* It must hence be understood that in a husband's property, the wife, by reason of her marriage, possesses always ownership, though not of an independent character, but that the husband does not possess even such ownership in his wife's property.—*Smri. Chan.*, Chap. IX, Sect. ii, Cl. 14. Observation.

MANU:—Such kinsmen as [by any pretence] appropriate the fortunes of women during their lives, a just king must punish with the severity due to thieves.—*Vyav, Mayú.*, Chap. IV, Sec. x, § 10. Further authority.

257. What has been promised to a woman by her husband, as her exclusive property, must be delivered by his sons, provided she remain with the family of her husband; but not if she live in the family of her father.†—KÁTYÁYANA. But,— *Vyavasthá.*

* *Dá. Krá. Sang.*, Chap. II, Sect. ii, § 36—41.

† *Vide* Coleb. Dig., Vol. III, 585, and *Dá. Ta.*, Chap. IX, § 6.

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Vyavasthá. **258.** A wife who does malicious acts injurious to her husband (*k*), who has no sense of shame (*l*), who destroys his effects (*m*), or who takes delight in being faithless to his bed, does not even deserve the *strí-dhana** (*strí-dhanam na cha sárhati.*)†—KÁTYÁYANA, cited in the *Kalpa-taru* and *Ratnákara.*

Kinsmen, resuming the exclusive property of such a woman, may take it to themselves.—The *Vivâda-chintámani.* See *Coleb.* Dig., Vol. III, p. 585.

Explanation. (*k*) '*Acts injurious to her husband;*'—the administering of poison or the like.—*Coleb.* Dig., Vol. III, p. 585.

Explanation. (*l*) '*Who has no sense of shame;*'—who goes to other towns on false pretences or the like.—*Ibid.*

Explanation. (*m*) '*Who destroys his effects;*'—who incurs expenses for immoral purposes.—*Ibid.*

Vyavasthá. **259.** Women have absolute dominion over such ornaments as were constantly worn by them during the life-time of their husbands, or with their assent;‡ the heirs of the latter having no power to appropriate the same.

Authority. ÁPASTHAMBA:—Ornaments are the exclusive property of a wife, and so is wealth given to her by kinsmen (*n*) or friends, according to some *legislators.*—*Vi. Chi.*, p. 260. *Coleb.* Dig., Vol. III, p. 405.

Explanation. (*n*) '*Wealth given by kinsmen*' means that which is given at the time of marriage, and so forth, by kinsmen and the kinsmen of her parents or those of her husband.—*Vi. Chi.*, p. 260.

Authority. MANU:—Such ornaments as are worn (*o*) by women during the life of their husbands, the heirs of the husband shall not divide among themselves: they who do so, are degraded from their tribe.§

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* *Coleb.* Dig., Vol. III, p. 585; and *Dá. Ta.*, Chap. IX, § 6.

† Mr Colebroke renders the phrase "*strí-dhanam na cha sárhati,*"—by "is held unworthy of the property above described;"—but this does not appear to be accurate, the verbatim translation of the passage being '*na*'—does not, '*cha*'—even, '*sárhati*'—deserve '*strí-dhanam,*'—woman's separate property (in general, not the above described alone).

‡ See *ante*, page 218.

§ *Smri. Chan.*, Chap. IX, Sect. ii, Cl. 27;—*Vyav. Mayú.*, Chap. IV, Sect. x, § 10. In the *Vivâda-chintámani* this text is cited as of MANU and VISHNU.—See *Vi. Chi.*, p. 260.

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Medhátithi explains this text in the following way: "An ornament or the like, though not given by the husband, but put on with his sanction, becomes the property of the wife by that act only."—*Dá. Ta.*, Chap. ix, § 2. Explanation.

(o) As are worn.] Here the word 'constantly' must be added; for constant wearing raises the presumption that the ornaments worn are *strí-dhana*, and excludes every hypothesis of fraudulent motive. As the above passage refers to property positively ascertained to be *strí-dhana*, it must be understood that constant wearing is essential to constitute such property.—*Smri. Chan.*, Chap. IX, Sect. ii, Cl. 28. Exposition.

'Wear,' meaning things worn by them, which have been given to them for the purpose by their husbands or the others.—*Vyav. Mayú.*, Chap. IV, Sect. x, § 10. Exposition.

Exception to the above,—

230. The husband, and none else, is competent to take his wife's *strí-dhana* of any description during his illness, in distress, for the preservation of the family, or for the performance of an indispensable religious duty, and is not liable to make good the same if he has no means to do so. *Vyavasthá.*

Vide Precedents, pp. 456, 447, 459.

However, if the husband has no means of subsistence, without using his wife's separate property, in a famine or other distress, he may take it in such circumstances, but not in any other case.—*Dá. Bhá.* Chap. IV, Sect. i, § 24. Authority.

So YÁJNAVALKYA declares:—"A husband is not liable to make good the property of his wife, taken by him (*p*) in a famine, or for the performance of a duty (*q*), or during illness, or while under restraint (*r*).*—*Dá. Bhá.*, Chap. IV, Sect. i, § 24. Authority.

(*p*) *Taken by him.*]—Taken by him under circumstances leaving no alternative. After the sentence "A husband is not liable to make good," add the words "Where he has no means to repay the amount, as in the case of poverty." When he acquires means, it is necessary that he should re-pay what he has taken out of the *strí-dhana.*—*Smri. Chan.*, Chap. IX, Sect. ii, Clause 21. Exposition.

* The last hemistich of this verse is not the same in the *Dáya-krama-sangraha* and *Dáya-tattwa*, as in the *Dáya-bágha*, wherein it is "*na strioi dátumarhati*," (he is not liable to make good to the woman,) whereas the reading inserted in the two former books is "*nákámo dátumarhati*" (he is not liable to make good unless willing): this latter reading is considered to be more proper and reasonable.

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Exposition. *(q) For the performance of a duty.*] Whether the duty be performable daily or occasionally. The particle "*cha*" used in the text, tends to show that the duty contemplated refers also to a temporal duty [*kámyam*], and, in some instances, to expiatory ceremonies, such as "*Griha Yajna*" or the like.—*Smri. Chan.*, Chap. IX, Sect, ii, Cl. 21.

Exposition. (*r*) '*While under restraint,*'—which a creditor or other person imposes on him for the purpose of recovering his right, being debarred at the same time from ablution, from food, &c.—*Dá. Kra. Sang.*, Chap. II, Sect. ii, § 34.

Exposition. (*r*) '*While under restraint.*']—While under the coercion of creditors or the like, which it is impossible to get rid of without payment of money.—*Smri Chan.*, Chap. IX, Sect. ii, Cl. 21.

Exposition. But, if he is able (to repay it), he must necessarily do so even in case the property has been taken in times of famine or similar (misfortunes).—*Ví. Mi.*, Sans., p. 216, (New Ed., p. 694).

Exposition. Here, by using the word *husband* alone, it is virtually declared, that woman's private property must not be taken by any other but him, even distressed by a famine or other calamity. Religious duties, such as are indispensable.—Under restraint, in prison.—*Vyav. Mayú.* Chap. IV, Sect. x, para. 10.

Conclusion. In a famine, for the preservation of the family, or at a time when a religious duty must indispensably be performed, or in illness, or during restraint or confinement in prison, or under corporal penalties, the husband being destitute of other funds and therefore taking his wife's property, is not liable to restore it. But, if he seize it in any other manner [or under other circumstances], he must make it good.—*Mit.* In., Chap. II, Sect. xi, § 32.

Authority. DEVALA:—Her subsistence (*vritti*), her ornaments, her perquisite, and her gains (*lávha*), are separate property of a woman. She herself exclusively enjoys it, and her husband has no right to use it unless in distress (*s*). If he let it go in vain, or consume it, he must repay the value to the woman with interest. Or the property of a woman may be used to relieve a distressed son."*—*Smri. Chan.*, Chap. IX, Sect. ii, Cl. 15—18. See *ante*, p. 216.

Remark. This text of DEVALA is somewhat differently rendered in the *Vyavahára-Mayúkha.* The same runs thus:—"The maintenance (*t*), ornaments, perquisite and gain are the separate property of a woman; she herself exclusively enjoys it, and her husband has no right to it unless in dis-

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tress (*s*). If he let it go on a false consideration, or consume it, he must repay the value to the woman with interest, but he may use the property of his wife to relieve a distressed son."*—*Vyav. Mayú.*, Chap. IV, Sect. x, § 10.—*Vide* Coleb. Dig., Vol. III, pp. 577, 578.

(*s*) Unless in distress.]—This being said, there is no offence in taking it in distress.—*Ví. Mi. (Sans.,)* p. 216. Explanation.

(*t*) Maintenance.] Wealth given by her father, or the others for the purpose of subsistence.—*Vyav. Mayú*, Chap. IV Sect. x, para., 10. Explanation.

The distress referred to must be of such a character as it is impossible to get rid of, except with the use of the *stri-dhana.*—*Smri. Chan.*, Chap. IX, Sect. ii, Cl. 18. Remark.

Therefore, to relieve a distressed son also, he, the husband, can consume the wife's separate property. This is indicated by the latter part of the text itself. The term "son" is used to denote any member of the family. To relieve him from distress—that is, to relieve from the pain caused by the want of food and the like. The word "*cha* (and)" is used to indicate that the husband is competent to give away or to consume the wife's separate property without her permission in other difficulties which are caused by the want of money.—*Ví. Mi.*, p. 216 (New Ed., p. 693). Exposition.

The above having reference to giving away and consuming without permission, there is no offence if it be given away or consumed *with* her permission even without distress.—*Ibid.* Exposition.

The above passage of DEVALA is applicable to a case where a husband gives away or consumes his wife's *stri-dhana* without her (the wife's) permission *but without force.* This is inferable from the circumstance that no injunction of penalty, such as fine, is annexed to the direction contained in the passage that the value of the property must be repaid to the woman with interest.—*Smri. Chan.*, Chap. IX, Sect. ii, Cl. 16. Exposition.

Although the passage, "Neither the husband, nor the son," &c., used in the foregoing text of KÁTYÁYANA (p. 224) would lead to the supposition that it is applicable to the husband and others also, yet a consideration of the Remark.

* This text in original runs thus: देवलः—"दुर्भिक्षाभरणं शुल्कं, दानञ्च स्त्रीधनं भवेत्। भोक्ता च स्वयमेवेदं पतिर्नार्हत्यनापदि॥ दत्त्वा भोक्ष्येच भोगेच स्त्रियैदद्यात् सदङ्गिकम्। पुत्रार्त्ति-हरणे वापि स्त्रीधनं भोक्तुमर्हति॥" व्यवहार-मयूखः, १५४ पृः।

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texts following the passage, shews that the passage in question is applicable to the husband *alone*.* The texts are, "But if the husband have a second wife, and do not show honor to his first wife, he shall be compelled by force to restore the property, though amicably lent to him. If suitable food, raiment, and dwelling be withheld from the woman, she may exact her own property."—*Smri. Chan.*, Chap. IX, Sect. ii, cl. 23.

The above, however, relates to a virtuous wife, for a wicked one should receive no portion.—*Vyav. Mayu.*, Chap, IV, Sect. x. § 12. Consequently,—

Vyavasthá. **261.** Where the woman is disloyal or extremely wicked, she does not deserve to have and to use any portion of the separate property.

Authority. This is intimated by KÁTYÁYANA himself :—"But a wife who does malicious acts injurious to her husband, who has no sense of shame, who destroys his effects, or who takes delight in being faithless to his bed, does not even deserve the *strí-dhana* (*strí-dhanam na cha súrhati*)."†

Annotations.

261. Where, however, the woman is extremely wicked, even if she had not permitted the use of her separate property (as above noticed), she is herself incompetent to use it.—*Smri. Chan.*, Chap. IX, Sect. ii, Cl. 24.

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* Accordingly, it has been very properly remarked by Mr. Colebrooke that—"In distress, the husband may, for his relief, take his wife's separate property (*strí-dhana*). But he is not compellable by a creditor to do so; in other words, the creditor cannot seize the wife's goods in execution for the husband's debt."—*Vide* Precedents, pages 425, 426.

† See *ante*, page 226.

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SECTION III.

ORDER OF SUCCESSION TO THE STRI'-DHANA OF DIFFERENT DESCRIPTIONS OF WOMEN.

SUCCESSION TO THE STRÍ-DHANA OF A MAIDEN DAUGHTER.

To the property of a maiden daughter,—

262. First, the uterine brother is the successor; in his default, the mother; and failing her, the father.* *Vyavasthá.*

In regard to the property of a maiden, first the uterine brother is the successor; in his default, the mother; and failing her, the father.—*Dá. Kra. Sang.*, Chap. II, Sect. i, para. 1. Authority.

BOUDHÁYANA:—The wealth of a deceased damsel let the uterine brethren themselves take; on failure of them, it shall belong to the mother; or if she be dead, to the father."†—*Dá. Bhá.*, Chap. IV, Sect. iii, § 7. Authority.

263. Failing them, her parents' relations, as they may happen to be, succeed according to the order (hereafter shown). *Vyavasthá.*

The above, however, relates to wealth other than that which was given to the damsel by a bridegroom. Remark.

264. A bridegroom has a right to the wealth given by himself.*—See *ante*, page 160. *Vyavasthá.*

POITHÍNASI:—"The bridegroom shall take the gratuity given by himself."* Authority.

Annotations.

262, 263. To such property left by an unmarried woman, the heirs are her brothers, her father, and her mother successively; and failing these, her paternal kinsmen in due order.—Macn. H. L., Vol. I, page 38.

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* *Dá. Kra. Sang.*, Chap. II, Sect. ii, § 1. See *Dá. Bhá.*, Chap. IV, Sect. iii, § 7.

† This text is cited in the *Dáya-bhága* as of BOUDHÁYANA, and in the *Dáya-Krama Sangrahá* as of NÁRADA.

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Authority. NÁRADA :—"Let the first bridegroom on his return take back the presents he gave to the damsel, who has since been married; and in case of her death likewise let him receive back what he gave, after defraying the expenses which they have mutually incurred."*

ORDER OF SUCCESSION TO THE DIFFERENT KINDS OF THE STRÍ-DHANA OF A MARRIED WOMAN.

Succession to a woman's youtaka (*or* joutaka) *property.*

To a woman's *youtaka* or *joutaka* (*a*) property, or that received at her nuptials :—

Vyavasthá. **265.** Her maiden or unaffianced daughter succeeds first.†

Vide Precedents, pages 412—414.

Authority. MANU :—Property given to the mother on her marriage [*joutaka* (*a*)] is the share of her unmarried daughter.†—Chap. IX, *verse* 131.

Exposition. (*a*) Here *youtaka* or *joutaka* signifies property received at marriage : the word '*yuta* or *juta*,' derived from the verb '*Yu*' or '*Ju*' to mix, imports 'mingling' : mingling is the union of man and woman as one person which is accomplished by marriage. For a passage of scripture expresses : "Her bones become identified with his bones, flesh with flesh, skin with skin." Therefore what has been received at the time of marriage, is denominated *youtaka* or *joutaka*.—See *Dá. Bhá.*, Chap. IV, Sect. ii, § 14.

Exposition. (*a*) Here the word '*youtaka*' is derived from the verb "*Yu*" signifying to unite; and the union of husband and wife arises from marriage, since this is indicated by the following sacred text (recited at the time of marriage) : "What is thy heart let that become mine ; and what is my heart let that become thine." The reading *youtaka* is equally correct. The latter is adopted by VÁCHASPATI MISRA and RÁYA-MUKUTA.—*Dá. Ta.*, Chap. X, § 14.

Vyavasthá. **266.** In default of a maiden daughter, the daughter who has been affianced succeeds.†

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* *Dá. Kra. Sang.*, Chap. II, Sect. iii, § 2.—*Dá. Bhá.*, (1st Ed.,) p. 100.

† *Dá. Kra. Sang.*, Chap. II, Sect. iii, § 2;—*Dá. Bhá.*, (1st. Ed.,) pp. 82, 85, 100;—*Coleb.* Dig., Vol. III, pp. 587—606;—*Vide* Macn. H. L., Vol. I, p. 38 ;—Elb. In., p. 85.

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Vide Precedents, pages 433, 434.

GOUTAMA:—A woman's property goes to her daughters unaffianced, and to those not actually married.*(*b*) Authority.

(*b*) As, by the word 'daughters,' the right of succession by all the daughters is generally declared, the mention of 'unaffianced,' &c., becomes significant, as denoting the order in which they respectively inherit, and therefore first the maiden daughter succeeds; then the affianced daughter, that is, one whose troth is plighted; in her default, the married daughter described as above; and failing her, the succession devolves equally on the barren and widowed daughters. This is the meaning of the text.—*Dá. Kra. Sang.*, Chap. II, Sect. iii, § 4. Exposition.

A woman's separate property received at her nuptials goes to her daughters, and not to her sons (if there be a daughter), and the text of GOUTAMA is intended to explain the order of succession in this case (of an inheritance devolving on the female issue). First, the woman's property goes to her unaffianced daughters. If there be none such, it devolves on those who are betrothed. In their default, it passes to the married daughters. For the right of the female issue generally is suggested by the term 'daughters' (in GOUTAMA's text); and the special mention of 'unaffianced' and 'unmarried,' which follows, is pertinent as declaratory of the order of succession.—*Dá. Bhá.*, Chap. IV, Sect. ii, § 22, 23. Exposition.

267. Failing the damsel affianced, the married daughters who have, and who are likely to have, male issue, succeed together.* *Vyavasthá.*

VASHISHTHA:—Let the females share the nuptial presents [*párináyya* (*a*)] of their mother.—*Dá. Bhá.*, Chap. IV, Sect. ii, § 15. Authority.

(*a*) '*Párináyya*'—signifies wealth received at a marriage (*Parinaya*).—*Ibid.*

In certain forms of marriage termed *bráhma*, &c., what has been received by a woman at the nuptial fire, goes, after her death, first to her daughters. Again, the right devolves first on the maiden daughter; if there be none, it Authority.

* *Dá. Kra. Sang.*, Chap. II, Sect. iii, § 4;—*Dá. Bhá.*, (1st Ed.,) pp. 85, 100 (post, pp. 256—258);—*Coleb.* Dig., Vol. III, pp. 588—590. See Macn. H. L., Vol. I, pp. 38, 39, and Elb. In., p. 85.

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descends to the betrothed daughter; or for want of such, it goes to a married daughter (including even a barren or widowed one); or on failure of all daughters, it devolves on the son.—*Ibid.*, § 25.

Vyavasthá. **268.** On failure of either of them, the other takes the succession.*

Vyavasthá. **269.** If there be none of the above description of daughters, the barren and widowed daughters have an equal right.*

Authority. The right of the barren and (sonless) widowed daughters to succeed, notwithstanding they confer no direct benefits through the medium of sons, is gathered from the text of GOUTAMA above quoted (p. 233), which declares the right of succession by the daughters generally, whether married or unmarried.—*Dá. Kra. Sang.*, Chap. II, Sect. iii, § 7.

Authority. The order of succession is this: first the property goes to the maiden daughter; then to one betrothed, for she is superior to the married daughter, because she belongs to the same original family (*gotra*) with her parents. On failure of such, the property devolves on the married daughter, that is, one who has a son, or who may be expected to have offspring. If there be none such, it goes to any other daughter.—SRÍ-KRISHNA and ACHYUTA.—*Dá. Bhá.*, (1st Ed.,) p. 85, Annotation.

Vyavasthá. **270.** On failure of either of them, the other succeeds.*

Remark. By the word 'daughters' the right of all the daughters being generally declared, and it being said that on failure of all daughters the succession devolves on the sons, the son and the rest are not entitled while there exists a single daughter of any description.

Vyavasthá. **271.** Here, however, on the death of a maiden daughter, or of one affianced, in whom the succession had vested, and who, having been subsequently married, is ascertained to have been barren,

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* *Dá. Kra. Sang.*, Chap. II, Sect. iii, § 5—8;—*Coleb.* Dig., Vol. III. pp. 587—629;—*Dá. Bhá.*, (1st Ed.,) pp. 85, 86, 100 (post, 256—258). See Macn. H. L., Vol. I, p. 39, and Elb. In., p. 85.

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or on the death of a widow who has not given birth to a son, the property which had passed from the mother *as an inheritance* would devolve next on the sisters having, and likely to have, male issue, and in their default, on the barren and widowed daughters;—not on the husband of such daughter (as above mentioned, in whom the succession had vested).*—*Dá. Kra. Sang.*, Sans., p. 6. *Vyavasthá.*

For, the right of the husband is relative to the *woman's separate* property; and wealth which has in this way passed from one to another, being ancestral property descended by inheritance,† can no longer be considered as the *woman's separate* property: this must be understood.—*Ibid.* Reason.

But to the property received by the mother at the time of her marriage, the maiden and the married daughters succeed notwithstanding the sons by reason of the text of VASHISHTHA, which says: "Let the females share the nuptial presents of their mother."—*Dá. Ta.*, Chap. X, § 12. Authority.

"At the time of marriage" means time previous and posterior to the actual time of marriage. This is described in the treatise on marriage to begin from the *Shráddha* for prosperity, and to end with the ceremony of prostrating before the husband.—*Dá. Ta.*, Chap. X, § 15. Explanation.

"A woman's separate property goes to her daughters, maiden and those not actually married." From this text of GOUTAMA, it follows that the nuptial presents descend first to the maiden, that is, unaffianced daughters; in their default, to those daughters that are affianced, but not actually married: on failure of these, they appertain to the married daughters implied by the term 'and,' because it is first generally laid down—"A woman's property goes to her daughters," but the concluding portion, namely,—"Maiden and those not actually married," is intended to show the order of succession.—*Ibid.*, para. 13. Exposition.

272. On failure of all the daughters, the son has a right to succeed.‡ *Vyavasthá.*

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* *Vide* Wynch's Translation, Chap. II, Sect. iii, § 6, and *ante*, page 220.

† This much appears to have been omitted in the translation made by Mr. Wynch.

‡ *Dá. Bhá.*, (1st Ed.,) pp. 82, 100 (post, 256—258); *Dá. Kra.*, Chap. II, Sect. iii, § 8. See Macn. H. L., Vol. I, p. 39.

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Authority. NÁRADA:—Let daughters divide their mother's wealth; or, on failure of daughters, her male issue.—*Dá. Bhá.*, Sect. ii, § 13.

Authority. KÁTYÁYANA:—But on failure of daughters, the inheritance belongs to the son.—*Ibid.*

Authority. YÁJNAVALKYA:—Daughters (*b*) share the residue of their mother's property, after payment of her debts; and the male issue succeeds in their default.—*Ibid.*

Exposition. In default of all daughters, the son has a right to succeed; for the text of YÁJNAVALKYA declares the right of the son to succeed on failure of daughters by the terms "male issue" expressed in this text. The text of BOUDHÁYANA also declares, that "Male issue of the body being left, the property must go to them."—*Dá. Kra. Sang.*, Chap. II, Sect. iii, § 8.

Explanation. (*b*) The word 'daughters,' in the text of YÁJNAVALKYA, having the termination of the first or nominative case, and the pronoun ('their') having that of the fifth or ablative, cannot be connected with the term 'issue,' by construction, which requires the sixth or relative case. But this term governs the word 'mother' notwithstanding the intervention of mediate terms. Thus, then, with the certainty that 'issue of the mother' is here intended, it is reasonable to interpret issue of the mother [as signifying son] in the texts of NÁRADA and KÁTYÁYANA: for there can be no contradiction [since the passages must be presumed to be grounded on the same revelation]. Moreover, conformably with the text of BOUDHÁYANA,—"Male issue of the body being left, the property must go to them;" and because nearer of kin [than the daughter's son, who is a mediate descendant], it is reasonable, that the son born of her body should have the right of succession to his mother's property, and not the daughter's son, who is a mediate descendant not born of her person.—*Dá. Bhá.*, Chap. IV, Sect. ii, § 20.

Vyavasthá. **273.** In default of the son, the daughter's son inherits.*

Reason. For it is reasonable that, since the daughter's claim is preferred to that of the son, the son of the debarred son should be excluded by the son of the person who bars his claim.—*Dá. Kra. Sang.*, Chap. II, Sect. iii, § 9.

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* *Dá. Kra. Sang.*, Chap. II, Sect. iii, § 9.—*Dá. Bhá.*, (1st Ed.,) pp. 96, 100, (post, pp. 256–258);—*Coleb.* Dig., Vol. III, pp. 587—606. See Macn. H. L., Vol. I, p. 39, and Elb. In., p. 85.

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274. Failing the daughter's son, the son's son succeeds. In his default, the great-grandson in the male line.* *Vyavasthá.*

The cause of daughters being preferred to sons, and daughter's sons to son's sons, in the succession of the *strí-dhana* received at nuptials, appears to be that a male child is procreated, if the seed predominate, but a female, if the woman contribute most to the fœtus. Thus MANU:—"But a boy is in truth produced by the greater quantity of male strength, a girl by a greater quantity of the female; by equality an hermaphrodite, or a boy and a girl; by weakness or deficiency, is occasioned a failure of conception." —Chap. III, *v.* 49. Remark.

According to the degree in which benefits are conferred by them.—*Dá. Kra. Sang.*, Chap. II, Sect. iii, § 10. Authority.

275. In default of the great-grandson in the male line, the son of a rival wife succeeds.* *Vyavasthá.*

VRIHASPATI:—The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother-in-law, and the wife of an elder brother, are declared similar to mothers. If they leave no issue of their bodies (*ourasa*), nor *son*, nor daughter's son, nor son of those persons, the sister's son and the rest shall take their property.* Authority.

The term 'son,' which occurs as above 'nor sons,' is intended to propound the right of succession by the son of a rival wife; otherwise, it is useless to consider it as a discriminative of '*Ourasa*,' meaning of itself 'legitimate issue;' and it would also follow that the younger brother of the woman's husband and the rest would have a right to succeed, notwithstanding the existence of the son of a rival wife.* Exposition.

In expounding the text of VRIHASPATI, above cited, JÍMÚTA-VÁHANA says: "Both son (*c*) and daughter are here signified by the term 'issue of the body.' For they bar every other claimant. By 'son' is meant the child of a rival wife. For a passage of law expresses, 'If among all the wives of the same husband, one bring forth a male child, MANU has declared them all, by means of that son, to be mothers of male issue.' Nor is the term 'son' an epithet of 'issue of the body:' for it would be superfluous; and the sister's son and other remote heir would have the Remark.

* *Dá. Kra. Sang.*, Sect. iii, § 10, 11;—*Dá. Bhá.*, (1st Ed.,) pp. 96, 100, (post, pp. 256—258). See Macn. H. L., Vol. I, p. 39.

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right of succession, though a son of a contemporary wife be living. If there be no legitimate son or daughter,* nor a son of a rival wife, the right of succession devolves on the daughter's son."† (Coleb. *Dá. Bhá.*, Chap. IV, Sec. iii, § 32.) And thus he holds that the son of a rival wife is entitled in preference to the daughter's son. SRÍ-KRISHNA TARKÁLANKÁRA, however, has laid down that the son of a rival wife is entitled to inherit after a daughter's son, son's son, and son's grandson in the male line.† RAGHU-NANDANA, JAGAN-NÁTHA TARKA-PANCHÁNANA, and the rest also, have done the same. The doctrine laid down by these is most prevalent as well as consistent; for MANU says: "Between a son's son and the son of a daughter there is no difference in law; since their father and mother both sprung from the body of the same man:" and accordingly a daughter's son is by reason of consanguinity preferable to the son of a rival wife.

By the pronoun in the phrase "son of those persons," the woman's own issue and the child of a rival wife are signified.—Therefore, their sons have a right to inherit; not the son of a daughter's son also, for he is excluded, from the oblation of food at obsequies.—*Dá. Bhá.*, Chap. IV, Sect. iii, § 34.

Explanation. *(c)* 'The term '*son*' includes also adopted sons.—ACHYUTA, and others.—*Dá. Bhá.*, Chap. IV, Sect. iii, § 32, Annotation.

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* In Colebrooke's translation of the *Dáya-bhága* the words 'nor a *grandson* in the male line' are inserted between the words '*daughter*' and '*the son of a rival wife.*' But I do not find such reading in any of the editions of the original. The reading to be found in the printed copies of the *Dáya-bhága* in *Sanskrit*, is—"If there be no legitimate son and daughter of the body, nor a son of a rival wife." MAHESHWARA has rejected the words 'nor a grandson' as unnecessary, and improperly introduced; and RAGHU-NANDANA has altogether omitted them. Mr. Colebrooke, after citing MAHESHWARA and RAGHU-NANDANA, seems by his silence to have approved of the reading adopted by them. The words in question have not therefore been inserted here, being as they are quite unnecessary, and because the only result of their insertion would be that the daughter's son would be entitled to succeed after the legitimate son and daughter of the body, the son's son, and the son of a rival wife; but such order of succession is not respected for reasons already stated.

† "*Nor a son of a rival wife, the succession devolves on the daughter's son*".] This passage is censured by SRÍ-KRISHNA, who shows, by satisfactory reasoning, that the daughter's son ought to inherit before the son of a contemporary wife. ACHYUTA considers the reading of the text to be questionable; and MAHESHWARA pronounces it to be spurious; he also rejects the words "nor a grandson" as unnecessary, and improperly introduced in this place. RAGHU-NANDANA in the *Dáya-tattwa*, copying JÍMÚTA-VÁHANA's argument, omits this passage altogether; and the author of the *Vira-mitrodaya* has substituted one of a quite different import.—*Dá. Bhá.*, (1st Ed.,) p. 96, Annotation.

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276. In default of the son of a rival wife, her grandson succeeds; and failing him, her great-grandson.* *Vyavasthá.*

Since they both present oblations to her husband, in which she also participates.* Reason.

The order of succession in default of heirs as far as the great-grandson in the male line of the rival wife, will be found in the succession to a childless woman's separate property. Remark.

SUCCESSION OF A WOMAN'S CHILDREN TO HER A-JOUTAKA† PROPERTY.

To a woman's separate property not received at her nuptials (*a-joutáka*),†—

277. First, the maiden daughter and son succeed together.‡ *Vyavasthá.*

Vide Precedents, pages 412—415.

VRIHASPATI:—"A woman's property goes to her children; and the daughter is a sharer with them, provided she be unaffianced; but if married, she shall not receive the maternal wealth." Here the term 'children' intends sons: and they share their mother's goods with unbetrothed daughters. So SHANKHYA and LIKHITA say—"All uterine brothers are entitled to the wealth equally; and so are unmarried sisters."—*Da. Bhá.*, Chap. IV, Sect. ii, § 3, 4. Authority.

Here it is expressly declared that the mother's goods are common to the son and unmarried daughter: and if the maiden daughter were exclusively entitled to the whole of her mother's estate, the especial texts of MANU and others, concerning the (*joutaka* or) wealth given at the nuptials, would be unmeaning; since she would have the right in all cases indiscriminately.—*Ibid.*, § 7. Exposition.

In the case of peculiar property of a woman (not obtained by her at the time of nuptials, and) not given to her by Authority.

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* See SRÍ-KRISHNA'S Commentary on the *Dáya-bhágá*, Sans., p. 118, and *Dá. Kra. Sang.*, Chap. II, Sect. iii, § 8;—*Dá. Bhá.*, (1st Ed.,) 100, (post, pp. 256—258). See Macn. H. L., Vol. I, p. 39.

† '*A-joutaka*,' that is, property not received at nuptials.—See *Joutak*, *ante*, page 232.

‡ *Dá. Kra. Sang.*, Chap. II, Sect. iv, § 1—4;—*Dá. Bhá.*, (1st Ed.,) pp. 78, 79, 100, (post, pp. 256—258). See Macn. H. L., Vol. I, p. 39, and Elb. In., page 85.

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her father at the time of the wedding, or at any other time, the son and unmarried daughter inherit together.—*Dá. Kra. Sang.*, Chap. II, Sect. iv, § 2.

Authority. This is declared by the first half of the following text of DEVALA:—"A woman's property is common to her sons and unmarried daughters when she is dead; but if she leave no issue, her husband shall take it, her mother, her brother, or her father."—*Dá. Kra. Sang.*, Chap. II, Sect. iv, § 3.

Exposition. Since the words "sons and unmarried daughters" are exhibited in the conjunctive compound (called) '*Dwandwa*,' and because the words "common to" are here expressed, it results that the son and the unmarried daughter possess the right of inheritance together.—*Ibid.*, § 3, 4.

Vyavasthá. **278.** In default of either of them, the other succeeds.*

Vyavasthá. **279.** In default of both of them, the married daughter who has, and the married daughter who is likely to have, male issue, equally succeed.*

Authority. For the cause above stated, the son and the maiden daughter have a like right of succession. On failure of either of them, the succession devolves with equal rights on the married daughter who has a son, and on her who may have male issue. For by means of their sons they may present oblations at solemn obsequies (*Párvana*).—*Dá. Bhá.*, Chap. IV, Sect. ii, § 9.

Authority. On failure of both these two, the succession devolves equally on the married daughter who has, and the married daughter who is likely to have, male issue; for a text of NÁRADA recites: "In default of a son, let a daughter take the succession, for they are both offspring alike:" and because oblations at solemn obsequies are presented by the daughter through the medium of her son to the husband of a woman, in which she participates [that is, oblations are presented by the daughter's son to his own maternal grandfather].—*Dá. Kra. Sang.*, Chap. II, Sect. iv, § 5.

Vyavasthá. **280.** In default of either of them, the other succeeds.*

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* *Dá. Bhá.*, (1st Ed.,) pp 80, 100 (post, pp. 256—258);—*Dá. Kra. Sang.*, Chap. II, Sect. iv, paras. 5, 6. See Macn. H. L., Vol. I, p. 40, and Elb. In., page 87.

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281. On failure of both of them, the son's son inherits.* *Vyavasthá.*

For he presents an oblation at solemn obsequies (*párvana*) to the husband of the woman, of which she partakes.— *Dá. Kra. Sang.*, Chap. II, Sect. iii, § 6. Reason and authority.

282. In default of the son's son, the daughter's son succeeds.* *Vyavasthá.*

Hence, [since the right is founded on the presenting of oblations at solemn obsequies,†] the daughter's son is entitled to the property, on failure of the daughters above described: for the text of MANU expresses, "Even the son of a daughter delivers him like the son of a son." Neither a barren nor a widowed daughter inherits; for these present not oblations at solemn obsequies (*párvana*), either in person, or by means of their offspring. Accordingly, (since the daughter's right of succession is founded on benefits conferred through the means of her male issue;† or since neither the barren nor the widowed daughter's right of equal succession is recognised;‡) NÁRADA says: "On failure of the son, the daughter inherits; for she equally continues the lineage." But, if there be a son's son and a daughter's son claiming the succession, the son's son has the exclusive title; for it is reasonable, since the married daughter is debarred from the inheritance by the son, that the son of the debarred daughter shall be excluded by the son of the person who bars her claim.—*Dá. Bhá.*, Chap. IV, Sect. ii, § 10,11. Authority.

In default of the son's son, the daughter's son succeeds; for it is reasonable, since the claim of the married daughter is barred by the son, that the son of the debarred daughter should be debarred by the son of the person who obstructs her claim: and a text of MANU reciting that,—"A daughter's son delivers him in the next world like the son of a son," declares the right of the daughter's son to succeed. *Dá. Kra. Sang.*, Chap. II, Sect. iv, § 7. Authority.

"Like the son of a son." From this expression it results that when there is no longer an adverse claim, the daughter's son has a right to succeed after the son's son.—*Ibid.* Explanation.

283. In his default (that is in default of the daughter's son,) the great-grandson in the male line succeeds. Failing him, the son of a contem- *Vyavasthá.*

* *Dá. Kra. Sang.*, Chap. II, Sec. iv, § 6, 7;—*Dá. Bhá.*, (1st Ed.,) p. 100. (Post, pp. 256—258.) See Macn. H. L., Vol. I, p. 40, and Elb. In., p. 87.

† SRÍ-KRISHNA. ‡ ACHYUTA.

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porary wife, her grandson and great-grandson in the male line.*—*Dá. Kra. Sang.*, Chap. II, Sect. iii, § 9.

Reason. Since all these present funeral oblations to the husband of the woman, in which she participates.—*Ibid.*

Vyavasthá. **284.** After these, the barren and widowed daughters both inherit together.*

Reason. For they too rank among the progeny of the woman, and the right of the husband to succeed is only in the case of a failure of progeny generally.—*Dá. Kra. Sang.*, Chap. II, Sect. iv, § 10.

Authority. But, in the instance of property not received at a wedding, and other than such as is given by the father, the son and unmarried daughter inherit together; or on failure of them, the daughters, who have, or may have, male issue; and, afterwards, the son's son, the daughter's son, the great-grandson in the male line, the son of the contemporary wife, her grandson and great-grandson in the male line, are rightful claimants to succession; next to these, the barren and widowed daughters inherit together, and lastly the order is, as before, the same with that of property received at *Bráhma* nuptials.—SRÍ-KRISHNA's Summary of the succession to *strí-dhana* given in his Commentary on the *Dáya-bhága.*—See *Dá. Bhá.*, (1st Ed.,) p. 100, (Post, pp. 256—258).

Vyavasthá. **285.** Failing either of these, the other succeeds.†

Remark. JÍMÚTA-VÁHANA says, "On failure of all these above mentioned, including the daughter's son (and the son's grandson,) the barren and widowed daughters both succeed to their mother's property; for they also are her offspring; and the right of others to inherit is declared to be on failure of issue."—*Dá. Bhá.*, Chap. IV, Sect. ii, § 12.

Remark. So according to JÍMÚTA-VÁHANA the barren and the widowed daughters succeed in default of heirs as far as the daughter's son; but according to SRÍ-KRISHNA TARKÁLANKÁRA, the great-grandson in the male line succeeds in default of the daughter's son, after him succeed the son, grandson, and great-grandson, in the male line, of the rival wife, then the barren and (sonless) widowed daughters, are

* *Dá. Bhá.*, (1st Ed.,) p. 100, (Post, pp. 256—258).—See Macn. H. L., Vol. I, p. 40.

† *Dá. Kra. Sang.*, Chap. II, Sect. IV, § 10;—*Dá. Bhá.*,(1st Ed)., pp. 81 and 100. (Post, pp. 256—258).—See Macn. H. L., Vol. I, p. 40.

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entitled to inherit.*—The doctrine of SRÍ-KRISHNA is prevalent, and respected in preference to that of JÍMÚTA-VÁHANA.

SUCCESSION TO A WOMAN'S STRÍ-DHANA GIVEN BY HER FATHER AT ANY TIME SOEVER.

In regard to the wealth given by a father to a woman at the time of wedding, or antecedent or subsequent to it.†—

286. A maiden daughter inherits in the first place.‡—*Dá. Kra. Sang.*, Chap. II, Sect. v, § 1. *Vyavasthá.*

287. After her, a married daughter who has, and one who is likely to have, male issue, inherit together.‡—*Ibid.*, § 2. *Vyavasthá.*

288. Next, the succession devolves on the barren and widowed daughters.‡—*Ibid.*, § 3. *Vyavasthá.*

For a text of MANU declares:—

"The wealth of a woman which has been in any manner given to her by her father, let the *Bráhmaní* (*a*) *damsel* take, or let it belong to her offspring."—Chap. IX, *v.* 198. Authority.

Here, by the specification of "given by the father," it is intended, that whatever has been given by the father *even* at any other time than that of the wedding, belongs first to the *damsel*, and after her, it goes to her offspring,—her son.—*Dá. Kra. Sang.*, Chap. II, Sect. v, § 4. Exposition.

(a) The term '*Bráhmaní*' is merely illustrative (indicating that a daughter of the same tribe with the giver inherits§).—*Dá. Bhá.*, Chap. IV, Sect. ii, § 16. Explanation.

(a) The expression "*Bráhmaní* damsel" is merely an illustrative recitation *(anuváda)*. Thus it is stated in the *Dáyabhága*.—*Dá. Kra. Sang.*, Chap. II, Sect. v, § 5. Explanation.

As for a passage of MANU,—"The wealth of a woman, which has been in any manner given to her by her father, let the *Bráhmaní* damsel take; or let it belong to her offspring;" since the text specifies "given by her father," Exposition.

* See *Dá. Bhá.*, (1st Ed.,) p. 100, (Post, pp. 256—258).

† *Dá. Kra. Sang.*, Chap. II, Sect. v, § 1.

‡ See *Dá. Bhá.*, Chap. IV, Sect. ii, § 16 and *Dá. Ta.*, Chap. X, § 16.

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the meaning must be, that property, which was given to her by her father, *even* at any time besides that of the nuptials, shall belong exclusively to her daughter.—*Dá. Bhá.*, Chap. IV, Sect. ii, § 16.

Exposition. As for the text of MANU—"The wealth of a woman which has been in any manner given to her by her father, let the *Bráhmaní* daughter take: or let it belong to her offspring;" since the text specifies "given by her father," the meaning must be that property which was given to her by her father, *even* at any other time than that of the nuptials shall belong exclusively to her daughter.—*Dá. Ta.*, Chap. X, § 16.

Remark. The above order of succession to the property given by a father is the same as given in the *Dáya-krama-sangraha*, and is in conformity with the *Dáya-tattwa*, *Dáya-bhága* and all the commentaries on the latter, excepting the one written by SRÍ-KRISHNA, and above all, it is in conformity with the above-cited text of MANU, as expounded by SRÍ-KRISHNA, RAGHU-NANDANA, and JÍMÚTA-VÁHANA, who are authors of the above books and paramount authorities on the Bengal school, and according to whose exposition, no one can succeed to the above description of property so long as a single daughter exists.

Remark. It is, moreover, to be remarked that, in the face of such preponderance of authorities, SRÍ-KRISHNA has, in his Summary of succession to *strí-dhana* (contained in his Commentary on the *Dáya-bhága*), differed from the above order. First, by excluding from this section* that description of the father's gift which is made at nuptials;† secondly, by inserting the succession of the son before that of the daughters having, and likely to have, male issue; and, thirdly, by placing the barren and sonless widowed daughters after the rival wife's son, grandson, and great-grandson. The passage laying down the order in question runs thus:—"In the case of property given by the father *at any other time but the wedding*, a maiden daughter succeeds in the first instance; next, a son; and then a daughter who has, and one who is likely to have, male issue; the son of a contemporary wife, and her grandson and great-grandson in the male line; next to these, the barren and widowed daughters inherit together: afterwards the succession proceeds as before described in the case of property received at nuptials denominated *Bráhma*, &c."—Colebrooke's Trans-

* Very likely upon consideration of its being included in the *yautaka strí-dhana* already treated of.—See *ante*, pages 232—239.

† See *ante*, pages 232—239.

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lation of SRÍ-KRISHNA's Commentary on the *Dáya-bhága*, First Edition, page 100.

But when SRÍ-KRISHNA in his latter work, the *Dáya-krama-sangraha*, which is a main book and not a commentary, having altered the above order, has laid down the order of succession (to the property given by a father) according to MANU, JÍMÚTA-VÁHANA, RAGHU-NANDANA, and the rest, as already shown, we are warranted to conclude that he has afterwards changed the position of the heirs to this description of *strí-dhana*, which was given by him in the above passage. The order of succession in the passage in question could not, therefore, be adopted in the present work in preference to the one given by himself in his subsequent work, the *Dáya-krama-sangraha*, which is preferably followed by all the subsequent authors both native and European.* Conclusion.

289. In default of all daughters, the son succeeds. *Vyavasthá.*

In default of all daughters, the son and the rest.—*Dá. Kra. Sang.*, Chap. II, Sect. v, § 3. Authority.

From the term "the rest," used in the above passage, it is to be deduced that—

290. After the son, succeed in order the daughter's son, the grandson and the great-grandson in the male line. *Vyavasthá.*

According as laid down by SRÍ-KRISHNA in his Summary of succession to *strí-dhana*.—Vide *Dá. Bhá.*, (1st Ed.,) page 100, (Post, pp. 256—258).

SUCCESSION TO THE STRÍ-DHANA OF A CHILDLESS WOMAN.

There is no difference in the order of succession to a childless woman's separate property in consideration of its being received by her at the time of nuptials, or at any other time. The only difference that exists is amongst the brother, husband, father, and mother, in the succession to the property given to her by her kindred (*a*), her fee or gratuity, and anything bestowed after marriage, or in consideration of her being married in the *Bráhma* or any of the four following forms, or in the *Ásura* or any of the two following forms.† After the heirs as far as the above, there is no difference in the order of succession to any kind of *strí-dhana* of a childless woman; that is to say, there is only one general order of Preliminary remarks.

* See *ante* page 94. † See *ante*, pages 161, 162.

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succession to the *strí-dhana* of whatever description it may be, and in whatever form of marriage the woman may have been married.

SUCCESSION TO THE STRÍ-DHANA GIVEN BY KINDRED, HER FEE OR GRATUITY, AND ANY PROPERTY, BESTOWED AFTER MARRIAGE.

To a woman's peculium given by her kindred *(a)*, her fee or gratuity, or property bestowed on her after marriage,—

Vyavasthá. **291.** First the uterine brother succeeds.*

Vide Precedents, pages 427—433.

Authority. YÁJNAVALKYA :—That which has been given to her by her kindred (*a*), as well as her fee or gratuity (*b*), and any thing bestowed after marriage, her kinsmen (*a*) take, if she die without issue.*

Authority. The wealth received by a woman after her marriage, from the family of her father, or her mother, or of her husband, goes to her brothers, (not to her husband†).—*Dá. Bhá.*, Chap. IV, Sect. iii, § 10.

Explanation. (*a*) Given by her kindred.] Presented to her by her father or mother (during her maidenhood‡). Hence (since the words "given by her kindred" intend given by the father and mother), their sons, who are her brothers, are the kinsmen here signified.—*Ibid.*, § 11.

Explanation. *(a)* The term "kindred" means her mother and father, consequently by the term "kinsmen" her brothers are signified.—*Dá. Kra. Sang.*, Chap. II, Sect. iii, § 16.

Vyavasthá. **292.** By the phrase "given by her kindred" is signified that which was given to her by her parents during her maiden state. For any thing received by her subsequently to her nuptials is comprehended under the denomination of 'gift subsequent (*anwádheya*):' and either the husband or the parents inherit that which was presented at the time of the wedding.*

Explanation. (*b*) What is given to a woman by artists constructing a house or executing other work, as a bribe to send her husband or other persons (of her family) to labour on such particular work, is her fee. It is the price (of labour); since its purpose is to

* Vide *Dá. Bhá.*, Chap. IV, Sect. iii, § 10, 11, 15;—*Dá. Kra. Sang.*, Chap. II, Sect. iv, § 15, 16.

† SRÍ'-KRISHNA. ‡ CHU'DÁMANI and SRÍ'-KRISHNA.

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engage (a labourer). Or a fee is that which is described by VYÁSA,—"What (is given) to bring the bride to her husband's house, is denominated her fee." That is, what is given by way of bribe or the like to induce her to go to the house of her husband. This fee, (as described in both the passages above cited,) occurs indiscriminately in any form of marriage, whether that termed *Bráhma* or another. Such, or any similar property of a childless woman, her brothers inherit. But it does not intend a gratuity (*shulka*) presented to damsels at marriage called *A'sura* and the rest. For that gratuity is restricted to the particular form denominated *A'sura* (and does not occur in the rest*).—*Dá. Bhá.*, Chap. IV, Sect. iii, § 20—23.

The barren and widowed daughters succeed to their mother's property; since they too are her children. On their default, the property devolves on the husband. This, however, does not refer to the property which was given by the parents; for to that the brother succeeds (in preference to the husband).—*Dá. Ta.*, Chap. X, § 9—11. Authority.

Vriddha-KÁTYÁYANA:—"Immoveable property, which has been given by parents to their daughter, goes always (*c*) to her brother, if she die without issue.† Authority.

(*c*) For it appears that the brother's right of succession is founded simply on her leaving no issue. The remark of VISHWARÚPA, that property of a childless woman married by any form of nuptials, from that of *Bráhma* to that of *Poishácha*, goes to her brother, should therefore be respected. Under the term "immoveables," the same must be true of other property by the argument, *á fortiori*,† exemplified in the loaf and staff.‡ Exposition.

Here since the terms "immoveable property" are used, the other property is of course intended by the argument drawn from the loaf and staff.‡ Thus it is stated in the *Dáya-bhága*. By the use of the term "always" it appears that the eight forms of marriage, namely, *Bráhma* and the rest are included.—*Dá. Kra. Sang.*, Chap. II, Sect. iii, para., 16. Exposition.

293. In default of the brother, the mother succeeds; failing her, the father succeeds.† *Vyavasthá.*

Vide Precedents, pages 427—433.

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* SRÍ'-KRISHNA.

† *Dá. Bhá.*, Chap. IV, Sect. iii, § 12—14. See *Dá. Kra. Sang.*, Chap. II, Sect. iv, § 16, 17.

‡ That is, a staff having been thrust through a loaf, the loaf is missing, and the staff is observed to have been knawed by rats: it is concluded, that the loaf has been devoured by them. This example of analogy, to which frequently allusion is made, in argumentative writings, is variously stated. According to one explanation, the reasoning exemplified by it is analogy drawn from association. According to another, it is an argument *á fortiori*.—See *Dá. bhá.*, (1st Ed.), p. 30.

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Authority. GOUTAMA :—"The sister's fee belongs to the uterine brothers; after them, it goes to the mother; and next to the father. Some say, before her."—*Dá. Bhá.*, Chap. IV, Sect. iii, § 27.

Explanation. The meaning of the passage is this: in the first place, that property goes to her brothers of the whole blood. But on failure of them, it belongs to her mother. *In her default, it devolves on the father.* Some say, before her. This is stated as the doctrine of others.—*Ibid.*, § 28.

Conclusion. Therefore, the property goes first to the whole brothers; if there be none, to the mother; if she be dead, to the father: but, on failure of these, it devolves on the husband. —*Ibid.*, § 29.

Authority. Failing the brother, the succession devolves on the mother; and in her default, the father inherits.—*Dá. Kra. Sang.*, Chap. II, Sect. iii, § 17.

Vyavasthá. **294. On failure of these, it devolves on the husband.***

Vide Precedents, pages 427—433.

Authority. KÁTYÁYANA :—That which has been given to her by her kindred goes, on failure of kindred (*o*), to her husband. —Some hold that the father succeeds first.*

Exposition. (*o*) By saying "on failure of kindred," the failure of brothers is likewise indicated. For, since the parent's right of succession is in default of brothers, (the failure of the preferable claim) must be concluded by the argument *á fortiori*,* exemplified in the case of the loaf and staff.†

SUCCESSION TO A CHILDLESS WOMAN'S STRI'-DHANA OF ANY DESCRIPTION EXCEPTING THAT WHICH IS GIVEN BY HER PARENTS IN HER MAIDEN STATE, OR RECEIVED AS A FEE OR GRATUITY, OR GIFT SUBSEQUENT.

If a childless (*a*) woman was married according to the form denominated *Bráhma, Doiva, Ársha, Gándharva,* or *Prájápatya,* then, to her separate property, not given by her parents in her maiden state, or by kindred, and not received as fee or gratuity, or gift subsequent,—

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* *Dá. Bhá.*, Chap. IV, Sect. iii, § 29, 30;—*Dá. Kra. Sang.*, Chap. II, Sect. iii, § 16, 17.

† See the last note of the last page.

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295. First her husband succeeds.* *Vyavasthá.*

MANU:—The wealth of a childless (*a*) woman, married according to the form denominated *Bráhma* or (any of) the remaining four forms (*b*),† goes to her husband.—Ch. IX, Verse 796. Authority.

YÁJNAVALKYA:—The separate property of a childless (*a*) woman married in the form denominated *Bráhma*, or in any of the four [unblamed forms of marriage(*b*)]† goes to her husband.—2. 146. Authority.

(*a*) 'Childless,'—that is, destitute of a son, daughter, the son of a rival wife, son's son, daughter's son, son's grandson (in the male line,) and the rival wife's grandson and great-grandson in the male line.—SRÍ-KRISHNA's Commentary on the *Dáya-bhága*, Sans., p. 94. Explanation.

(*b*) The four forms of marriage, at the head of which is that called *Bráhma*, are here intended. Those four are the *Doiva*, *A'rsha*, *Prájápatya*, and *Gándharva:* with the *Bráhma*, they make five. For MANU has specified five: namely, "the ceremonies called *Bráhma*, *Doiva*, *A'rsha*, *Gándharva*, and *Prájápatya*."†—*Dá. bhá.* Chap. IV, Sect. iii, § 3. Exposition.

296. On failure of her husband, her brother is the next successor.* *Vyavasthá.*

297. In default of the brother, the mother succeeds; in her default, the father is the successor.* *Vyavasthá.*

298. But if the woman was married according to any of the three forms styled, "*Ásura*, *Rákshasa* and *Poishácha*, then to her separate property of the above descriptions, the mother succeeds first; failing her, the father; in his default, the brother; after him, the husband.* *Vyavasthá.*

But a woman's property received at a marriage called '*Ásura*' and the like, her mother may take on her demise, though her husband be living; and on failure of the mother, the father. For, that order of succession results from the text;—"Her wealth is ordained to become the property of her mother, and of her father."‡ If then joint Authority.

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* *Dá. Kra. Sang.*, Chap. II, Sect. iii, § 14—16, 19, 21;—*Dá. bhá.*, (1st Ed.,) pp. 88—90 and 100, (post pp. 256—258). See Macn. H. L., Vol. I. pp. 39, 40 and Elb. In. pp. 85—87.

† See *ante*, pages 161, 162. ‡ MANU., Chap. IX, *vs.* 196, 197.

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succession were intended, the author would have said—"Become the property of her two parents." As the father's right of inheritance is declared to be on failure of the mother in the case of a maiden's property, the same is fitting in this instance also.—*Dá. Bha.*, Chap. IV, Sect. iii, para. 6.

Authority. But if the wealth were received by the woman at the time of her marriage, celebrated according to any one of the three forms denominated *Poishácha, Rákshasa* and *Ásura*, then in default of the great-grandson of the rival wife, the succession devolves first on the mother, then on the father.—*Dá. Kra. Sang.*, Chap. II, Sect. iii, § 19.

Authority. MANU declares:—"But her wealth given on the marriage called *Ásura*, or on either of the two others, is ordained, on her death without issue, to become the property of her mother and father (*Mátá-pitroh.**)—Chap. IX, *v.* 197.

Authority. In default of the father, the brother succeeds, and failing the brother, the succession devolves on the husband.—*Dá. Kra. Sang.*, Chap. II, Sect. iii, § 21.

Authority. In the next place, if the property were received at the time of nuptials celebrated in one of the five forms denominated *Bráhma*, &c., the order of succession is—'husband, brother, mother and father.' But if it were received at nuptials in one of the three forms called *Ásura*, &c., the order is—'mother, father, brother and husband.'—SRÍ-KRISHNA'S Summary of Succession to *Strí-dhana*. See *Dá. Bhá.*, (1st Ed.,) p. 100 (post, pp. 256—258).

SUCCESSION OF HEIRS IN DEFAULT OF SUCCESSORS AS FAR AS THE HUSBAND, MOTHER, BROTHER, AND FATHER TO ANY DESCRIPTION OF SEPARATE PROPERTY OF A WOMAN MARRIED ACCORDING TO ANY FORM OF MARRIAGE.

Then to any description of the separate property of a woman married according to any form of marriage,—

Vyavasthá. **299.** First the husband's younger brother succeeds.†

* Here the use of the compound in this form (*Mátápitroh*) is with the view of exhibiting the order of succession, for if it had been intended that the mother and father should inherit together, the form '*pitroh*' would have been observed.—*Dá. Kra. Sang.*, Chap. II, Sect. iii, § 20.

† *Dá. Krá. Sang.*, Chap. II, Sect. vi, § 1—3;—*Dá. Bhá.*, (1st Ed.), pp. 98, 99 and 100 (Post pp. 256—258). See Macn. H. L., Vol. I, pp. 39, 40, and Elb. In., pp. 86, 87.

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In default of successors down to the father, in respect of wealth received at nuptials solemnised according to any one of the five forms of marriage, denominated *Bráhma* and the rest, and on failure of successors down to the husband, in respect of wealth received at nuptials, celebrated according to any one of the three forms styled *Ásura*, &c., as well as in the case of all other peculiar property of a woman, the succession devolves on the husband's younger brother: for the right of the husband's younger brother and the rest to succeed at that time has been propounded by*— Authority.

VRIHASPATI:—"The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother-in-law, and the elder brother's wife, are pronounced similar to mothers: if they leave no issue (*a*) of their bodies, nor son, nor daughter's son, nor son of those persons, the sister's son and the rest shall take the property."* Authority.

(a) The word issue *(ourasa)* in this text implies both son and daughter. '*Nor son,*' must be considered as intending the '*son of a rival wife.*' It must not be supposed discriminative of the word '*issue,*' since it would be unmeaning, and it would follow that the succession devolved on the husband's younger brother and the rest, even while the son of a rival wife was existent. '*Nor son of those persons:*' here by '*those persons*' the son, and the son of a contemporary (or rival) wife are intended: the expression does not refer to the damsel's son and daughter's son's son, for the damsel's son is included in the term daughter's son, and the daughter's son's son confers no benefits, being incompetent to present the funeral offering (to the woman's husband.) By the term '*Vá*' *or* (of *nor*) the sons of the son and of the son of the rival wife are to be understood.—*Dá. Kra. Sang.*, Chap. II, Sect. vi, § 2. Exposition.

But the order of succession prescribed by the above text is not to be respected; for if this were the case, it would follow that the husband's younger brother would suceeed last, and this would be improper, since he confers greater benefits than all the others who are specified in that text, and the following texts of MANU: "To three ancestors (*i. e.*, the father, paternal grandfather and great-grandfather) must water be given at their obsequies; for three is the funeral cake ordained: to the nearest *sapinda* the inheritance next belongs," are recited in a treatise of inheritance, for the purpose of exhibiting that the order of succession takes place according to the greater or less benefits conferred; otherwise the introduction of them in such a treatise would be useless; consequently the order of succession must be understood as

* *Dá. Kra. Sang.*, Chap. II, Sect. vi, § 1.

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taking place according to the proximity of benefits conferred, and, this being the case, the order inferrable from the spirit of the text, rather than that derived from the letter of it, must be respected.—*Ibid.* Therefore—

Authority. The husband's younger brother is the first entitled to the succession, because he presents oblations to the woman, to her husband, and to three persons to whom her husband had to offer oblations, and he is moreover a *sapinda.*—*Ibid.*, para. 3.

Since the text (of VRIHASPATI) enumerates '*sister's son,*' &c., if the order of succession consequently be first the sister's son, then the husband's sister's son, next the child of the husband's younger brother, afterwards the child of the husband's elder brother, then the son of the brother, after him the son-in-law, and subsequently the younger brother-in-law, the right would devolve last of all on the younger brother of the husband, contrary to the opinion and practice of venerable persons; therefore, the text is propounded, not as declaratory of the order of inheritance, but as expressive of the strength of the fact, (namely, of the benefits conferred). Thus it is declared by MANU under the head of inheritance; "To three ancestors must water be given at their obsequies; for three is the funeral oblation of food ordained: the fourth is the giver of oblations; but the fifth has no concern with them." In like manner YÁJNAVALKYA shows succession to property in right of the funeral oblation: "Among these (sons of various descriptions,) the next in order is heir, and giver of oblations, on failure of the preceding." The son's preferable right too appears to rest on his presenting the greatest number of beneficial oblations, and on his rescuing his parent from hell. And a passage of *Vriddha* SHÁTÁTAPA expressly provides for the funeral oblations of these women: "For the wife of a maternal uncle, or of a sister's son, of a father-in-law, and of a spiritual parent, of a friend and a maternal grandfather, as well as for the sister of the mother or of the father, the oblation of food at obsequies must be performed. Such is the settled rule among those who are conversant with the *Vedas.*"—*Dá. Bhá.*, Chap. IV, Sect. iii, § 36.

Conclusion. This then is the order of succession, according to the various degrees (of benefit to the owner of the property*) from the oblation of food at obsequies. In the first place, the husband's younger brother is entitled to the woman's

* MAHESHWARA.

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property, for he is a kinsman (*sapinda,*) and presents oblations to her, to her husband, and to three persons to whom oblations were to be offered by her husband.—*Dá. Bhá.*, Chap. IV, Sect. iii, § 37.

300. In his default, the succession devolves upon the sons of the husband's younger and elder brothers. *Vyavasthá.*

Because they present oblations to the woman, to her husband, and to two persons to whom her husband had to offer oblations, (namely, to his father and grandfather,) and they are moreover within the degree of relationship termed '*sapinda.*'—*Dá. Kra. Sang.*, Chap. II, Sect. vi, § 4. Reason and Authority.

After him, the son either of her husband's elder brother, or of his younger brother, is heir to the separate property of his uncle's wife; for he is a kinsman, and presents oblations to her, and to her husband, and to two persons to whom oblations were offered by her husband.—*Dá. Bhá.*, Chap. IV, Sect. iii, § 37. Authority.

301. In their default, the woman's sister's son is entitled to the succession.* *Vyavasthá.*

In their default, the sister's son, though not a *sapinda*, is entitled to the succession: For he presents oblations to the woman, and to three persons, namely, her father, and the rest, to whom her son was bound to offer oblations. Authority.

302. Failing him, the husband's sister's son is heir.* *Vyavasthá.*

For he presents oblations to her, to her husband, and to three persons to whom her husband ought to have offered oblations.*

303. In his default, the woman's brother's son succeeds.* *Vyavasthá.*

For he presents oblations to the woman, and to her father and grandfather.*

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* *Dá. Kra. Sang.*, Chap. II, Sect. vi, § 5, 6, 7, 8;—See *Dá. Bhá.*, (1st Ed.,) pp. 98, 100 (Post, pp. 256—258). See also Macn. H. L., Vol. I, pp. 39, 40, and Elb. In. pp. 86, 87,

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Vyavasthá. **304.** Failing him, the son-in-law succeeds.*

Reason. Since he presents oblations to his father-in-law and mother-in-law.*

Authority. Failing all these heirs, including the son-in-law, the father-in-law, and the husband's elder brother, who are *sapindas*, succeed according to their nearness of kin.—*Dá. Kra. Sang.*, Chap. II, Sect. iii, § 10.

Authority. VRIHASPATI's text above quoted propounds, therefore, merely the right of succession by the persons above mentioned, and is by no means intended to exhibit the order in which they succeed.—*Ibid.*, § 9.

Vyavasthá. **305.** In default of heirs as far as the son-in-law, the father-in-law succeeds; after him, the husband's elder brother.

Authority. On failure of such, the sister's son, though he be not a kinsman (*sapinda*), inherits the separate property left by his mother's sister, because he presents oblations to her, and to three persons, (her father and the rest,) to whom oblations would have been offered by her son. In default of him, the son of her husband's sister (for it is reasonable, since the husband has weaker claim than the son, that persons claiming under them, should have a similar relative precedence;) is heir to the property of his uncle's wife, because he presents oblations to three persons to whom they were to be offered by her husband, and also presents oblations to her and to her husband. On failure of him, the brother's son is the successor to his aunt's property, for he presents oblations to her father, to her grandfather and to herself. If there be no nephew, the husband of her daughter is heir to his mother-in-law's property, since he presents oblations to his mother-in-law and father-in-law.—*Dá. Bhá.*, Chap. IV, Sect. iii, § 37.

Authority. This order of succession must be assumed: and the mention of 'a sister's son,' and the rest, (in the text of VRIHASPATI cited,) was intended merely for an indication of the heirs, without specifying the order in which they succeed.—*Dá. Bhá.*, Chap. II, Sect. iii, § 38.

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* *Dá. Kra. Sang.*, Chap. II, Sect. iv, § 8, 10;—See *Dá. Bhá.*, (1st Ed.,) pp. 98, 100. (Post, pp. 256—258.) See also Macn. H. L., Vol. 1, pp. 39, 40, and Elb. In., pp. 86, 87.

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306. Failing them, kinsmen allied by funeral oblations *(sapindas)* succeed in the order of proximity.* *Vyavasthá.*

On failure of these six, it must be understood that the succession devolves on the father-in-law, the husband's elder brother, and the rest, according to their nearness of kin,† (the nearest *sapinda* being the heir.)— *Dá. Bhá.*, Chap. IV, Sect. iii, § 39. Authority.

307. In default of the *sapindas*, the *sakulyas*, (distant kinsmen connected by family†) are heirs; after them, the *samánodakas* (persons allied by similar libations of water,)‡ succeed in the order of proximity.* *Vyavasthá.*

308. In default of all *sapindas*, the *sakulyas*, (distant kinsmen), those allied by common oblations of water *(samánodakas)*, and those descended from the same patriarch *(samána-pravaras)*, in the male line, succeed.* *Vyavasthá.*

309. Failing all these, in the case of the property of a *Bráhmaní* woman, *Bráhmanas*, inhabitants of the same village, exceedingly learned in the *Vedas*, are entitled to the succession. But in the case of the property of women of the *Kshatriya* and other tribes, the king is exclusively entitled to the inheritance.* *Vyavasthá.*

The heirs to *strí-dhana* are put down in the *Dáya-bhága* as far as *sapindas*, to which have been added *sakulyas* and *samánodakas* by SRÍ-KRISHNA in his commentary on the *Dáya-bhága*, as well as in his *Dáya-krama-sangraha*. In the latter it has moreover been laid down that persons descended from the same patriarch in the male line succeed in the same way as to the property of males.† The order of succession to a childless woman's *strí-dhana*, in default of heirs as far as the *sapindas*, being thus declared to be the same as to the property of males, it is to be remarked that according to this order, however, persons bearing the same family name, that is of the same race (*samána-gotra*) should succeed before those descended from the same patriarch Remark.

* *Dá. Krá. Sang.*, Chap. IV, Sect. vi, § 10—13 ;—*Dá. Bhá.*, (1st Ed.,) p. 100. (Post, pp. 256—258). See Macn. H. L. Vol. I, p. 39.

† See *ante*, pages 78—86, 97—100. ‡ See *ante*, pages 102—107.

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(*samána pravaras*) by reason of the former being nearer than the latter. But since the persons of the same race (*samána-gotra*) are comprehended in the general expression "descended from the same patriarch," the former should inherit before the latter, in the same manner as they do inherit the property of males. It has afterwards been laid down in the same work that,—"Failing all these, in the case of property of a *Bráhmaní* woman, *Bráhmanas*, inhabitants of the same village, and exceedingly learned in the *Vedas*, are entitled to the succession. But in the case of the property of women of the *Kshatriya* and other tribes, the king is exclusively entitled to the inheritance."* This also appears to have been laid down in accordance with the order of succession as contained in that book, wherein it will, however, be found that even to the property of the *Kshatriya* and other tribes *Bráhmanas* of the above description succeed before the king, and that the king can never succeed to a *Bráhmana's* property which must be taken by a *Bráhmana*.†

SUMMARY OF THE ORDERS OF SUCCESSION TO THE DIFFERENT DESCRIPTIONS OF STRÍ'-DHANA, GIVEN BY SRÍ'-KRISHNA IN HIS COMMENTARY OF THE DÁYA-BHÁGA.

The settled order of succession to the separate property of a woman is as follows :—

Summary. In the case of property left by a maiden, the right devolves first on the uterine brother; or, if there be none, on the mother; but, if she be dead, on the father.

It is the same in respect of property left by a betrothed damsel, excepting what was given by the bridegroom: for he has a right to whatever he gave.

In regard to the property of a married woman, which was received at her marriage, her maiden daughter has the first claim; and next, a betrothed one: but, on failure of both these, her married daughters, who have, or are likely to have, male issue, inherit together; or, on failure of either of them, the other takes the succession: if there be none of either description, the barren and the widowed daughters have an equal right; and, on failure of one, the other succeeds. Next the right devolves, in order, on the son, the daughter's son, the son's son, the great-grandson in the male line, the son of a contemporary wife, her grandson

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* *Dáya-krama-sangraha*, Chap. II, Sect. iv, § 12, 13.

† See *ante*, pages 109, 110.

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and her great-grandson in the male line, with this difference, that, according to the author of the work (JÍMÚTA-VÁHANA), the right of the daughter's son follows that of the contemporary wife's son.

In the next place, if the property were received at the time of nuptials celebrated in one of the five forms denominated *Bráhma*, &c., the order of successors is husband, brother, mother, and father. But, if it were received at nuptials in one of the three forms called *A'sura*, &c., the order is mother, father, brother, and husband.

Then the husband's younger brother; after him, the son of the husband's younger brother, and the son of his elder brother; next the sister's son; afterwards, the husband's sister's son; then the brother's son; after him, the son-in-law; next, the father-in law; subsequently, the elder brother-in-law. In the next place, kinsmen allied by funeral oblations *(sapindas,)* in the order of proximity; after them, kinsmen connected by family *(sakulyas)*; and, lastly, such as are allied by similar oblations of water *(samánodakas)*.

In the case of property given by the father at any other time but the wedding, a maiden daughter succeeds in the first instance: next a son; then a daughter who has, and one who is likely to have, male issue; after them, the daughter's son, the son's son, the great-grandson in the male line, the son of a contemporary wife, and her grandson and great-grandson in the male line: next to these, the barren and widowed daughters inherit together: afterwards, the succession proceeds as before described in the case of property received at nuptials denominated *Bráhma*, &c.

But, in the instance of property not received at a wedding, and other than such as is given by the father, the son and unmarried daughter inherit together; or, on failure of both of them, the daughters, who have, or may have, male issue; and, afterwards, the son's son, the daughter's son, the great-grandson in the male line, the son of the contemporary wife, her grandson and great-grandson in the male line, are rightful claimants in succession; next to these, the barren and widowed daughters inherit together: and lastly, the order is, as before, the same with that of property received at *Bráhma* nuptials.—*Dá. Bhá.*, (1st Ed.,) p. 100.

Remarks:—

Sir William Macnaghten, in his work on Hindú law, adopting SRÍ-KRISHNA'S order of succession, as above, to the *stri-dhana*, says,—"The order, above given, is chiefly taken from Colebrooke's translation of the *Dáya-bhága*, page 100. I do not find that the law in this particular varies materially in the different schools, except that (as in the case of succession to ordinary property) a distinction is made by the law of Benares, and other schools, between wealthy and indigent daughters."

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(Macn. H. L., Vol. I, p. 40. Note.) But if the learned writer had taken a little trouble to glance over Colebrooke's translation of the *Mitákshará*, he would have found to his surprise that the order of succession to the *stri-dhana*, as therein given, is far different from that given by SRÍ-KRISHNA and adopted by him. And, moreover, if he could ascertain the orders of succession to the same description of property given in the *Viváda-chintámani*, *Vyavahára-mayúkha* and *Smriti-chandriká*, the paramount guides respectively of the *Mithilá*, *Mahárashtra* and *Drávida* schools,* he would have been still more surprised to find that the orders of succession given in the above books not only vary materially from that which is adopted by him for all the schools, (and which, in truth, is for the Bengal school alone,) but also from that inculcated in the *Mitákshará* itself. To satisfy his curiosity, should the reader take a little trouble to look over the chapter on *stri-dhana* in the translations of the said books, and compare the order of succession to such property given by Sir W. Macnaghten with that given in each of those books, he will be astonished to find that the above is really the fact. Amidst such great and material discrepancies existing in the law treatises of the different schools, how the learned compiler (without consulting any of them) was warranted unscrupulously to declare—"I do not find that the law in this particular *varies materially* in the different schools," was known to himself! We, however, can only say this that, had not the *Mitákshará*, *Viváda-chintámani*, *Vyavahára-mayúkha*, and *Smriti-chandriká* been translated into English, so gross an error as the above would perhaps have been perpetuated by judicial decisions.

It may not be out of place here further to remark that, Mr. H. Cowell, in his Lecture on the *stri-dhana* according to the Bengal law, has not only omitted to give the definitions and descriptions of the different kinds of *stri-dhana* or woman's separate property, and the dominion of her husband or herself over such property, though these subjects are very important and extend over several pages of the *Dáya-bhága* and other text books, (more especially the present work†), but has written only one paragraph regarding succession to *stri-dhana*, quite forgetting that in Bengal law the various kinds of *stri-dhana* are classified under different heads, that the order of succession to each class of *stri-dhana* differs from that to another,‡ and that all these orders differ from the orders given in the *Mitákshará* and other books of the other schools.

That *wonderful* paragraph in which the learned Lecturer has attempted to concentrate the whole of the Bengal law of *stri-dhana* (which is more difficult than that of any other subject) runs thus :—"In the *Dáya-bhága* the law is laid down to

* *Vide* preface to the *Vyavasthá-chandriká*, pages XVI—XIX, and also the preface to the present work.

† See *ante*, pages 213—230. ‡ See the following table.

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the following effect:—'A woman's *strí-dhana* goes to her daughter, and not to her sons, if there be a daughter: first, to her unaffianced daughter; second, to those who are betrothed; third, to those who are married. If she be childless and have been married according to the four* admissible forms of marriage, her *strí-dhana* goes to her husband; otherwise the mother inherits in preference to the husband, and in default of the mother, the father succeeds. A uterine brother is preferred to the mother and father as heir to the maiden sister. On failure of heirs down to the husband, VRIHASPATI propounds the rule, that those who are similar to mothers *take,—viz.*, the mother's sister, the maternal *uncle*,† the father's sister, the mother-in-law, and the wife of an elder brother.' The order of succession is stated to be according to the various degrees *of benefit* to the owner of the property from the oblation of food at obsequies."—Cowell's Lectures delivered in 1871, pp. 218, 219.

But even this paragraph, (not to speak of its great deficiency,) is erroneous in several places; first, it asserts that, "a woman's *strí-dhana* goes to her daughter, and not to her son, if there be a daughter," but it was entirely forgotten that there is a sort of *strí-dhana*, which does go to the son and unmarried daughter *together*,‡ to the exclusion of all other daughters. The learned Lecturer does not state what kind of *strí-dhana* is meant by him. A uterine brother is preferred not only as heir to the maiden sister, but also as successor to a married sister's property given by her parents before marriage, as well as to her fee or gratuity, and also to the property bestowed on her after marriage.§ As to the rule propounded by VRIHASPATI, it does not mean that those who are similar to the mother take the *strí-dhana* of the *males* to whom they are so related, but, on the contrary, it means that the sister's son, and the rest, to whom they are similar, to their mothers, inherit *from them*.

The above text in original runs thus:—

"मातृ-ष्वसा मातुलानी, पितृव्य-स्त्री पितृ-ष्वसा ।
श्वश्रूः पूर्व्वज-पत्नी च, मातृ-तुल्याः प्रकीर्त्तिताः ॥"

Of this the true translation would be:—"The mother's sister, the maternal uncle's *wife*, the paternal uncle's wife, the father's sister, the mother-in-law, and an elder brother's wife, are pronounced similar to the mother."

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* Should be "one of the four," and not all four collectively.

† This should be maternal uncle's wife, inasmuch as the word in the original is *Mátulání*.

‡ See the following table. § See the following table.

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But Mr. Colebrooke, perhaps inadvertently, rendering the word "मातुलानी" (which means 'maternal uncle's wife') by the term 'maternal uncle,' and omitting altogether the term 'पितृव्य-स्त्री' (paternal uncle's wife), has translated the above text as follows:—"The mother's sister, the maternal *uncle*, the father's sister, the mother-in-law, and the wife of an elder brother, are pronounced similar to mothers."*— The learned Lecturer has taken the above defective and erroneous version to be his guide, without getting the same collated with the original, and then, what is still more strange, he has made the females who are pronounced similar to mothers, (and therefore ancestors or predecessors,) successors of those persons to whom they are pronounced to be equal to mothers, though the contrary is the law;— that is to say, he has made the mother's sister, maternal uncle's wife, paternal uncle's wife, father's sister, mother-in-law, and an elder brother's wife, respectively the *takers* of the *stri-dhana* of the sister's son, husband's sister's son, husband's brother's son, brother's son, son-in-law, and husband's younger brother; but these being *men*, and not *women*, common sense tells us that *their* property could not be *stri-dhana* or *woman's* separate property, unless they themselves were *women*, which they never could be. Instead of thus laying down the law from his own brain, if the learned Lecturer had taken the trouble to look at the other text of VRIHASPATI, which, in the *Dáya-bhága*, has been cited *immediately* after the above, and clearly states as to who of the above-mentioned persons are the predecessors, and who the successors, he would not, and could not, have fallen into so ridiculously absurd a blunder by converting the predecessors into successors, and *male successors* into *female predecessors*. The other text above alluded to is the subjoined:—

"यदासामौरसो न स्यात्, सुतोदौहित्र एव वा।
तत्सुतो वा धनं तासां स्वसीयाद्याः समाप्नुयुः॥"

The translation of this is as follows:—

"If they (*i. e.*, the females who are pronounced similar to the mother) leave no issue of their bodies, nor son (of a rival wife), nor daughter's son, nor son of those persons, the sister's son, and the rest, shall take their property."*

It will be found on perusal of the *Dáya-Bhága* and other books that the various descriptions of the *stri-dhana* are

* Coleb. *Dáya-bhága*, Chap. IV, Sect. iii, para., 31.

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classified under different heads,—*viz.*, 1, 'the property received at the time of the nuptials;' 2, 'that received at any other time;' 3, 'the property given by a father;' and 4, 'the property given to a woman by her parents before marriage, that given to her after marriage, and her fee or gratuity;' that the heirs down to the great-grandson of a rival wife vary in the order of succession to the first three kinds of property, and the order of succession to a childless married woman's property varies between a husband, brother, mother and father, with reference to the 4th description of property, as well as to the deceased's form of marriage; and that there is no variation in the order of succession to any kind of *stri-dhana* of a childless married woman among the subsequent heirs commencing with the husband's younger brother and ending with the king. All these are to be found in the text-books. Should the reader take but a little trouble to look over and examine any of those works, especially the *Dáya-bhága*, the present work, or the little pamphlet written by the late Bábú Prasanna Kumár Tagore, he will at once be convinced that what the learned Lecturer has written is wrong and defective in so great a degree that the single paragraph which he has put down as inculcating the Bengal law of the *stri-dhana*, tends only to mislead the student, who cannot gather therefrom even one of the three orders of succession to such property.

The following table will show at one view the positions of the heirs to the different descriptions of *stri-dhana*:—

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TABLE OF THE ORDERS OF SUCCESSION TO THE DIVERSE DESCRIPTIONS OF STRI'-DHANA OR WOMAN'S PECULIUM.

ORDER OF SUCCESSION TO THE PECULIUM OF AN UNMARRIED DAUGHTER.*

1 The whole brother. 2 The mother. 3 The father.

Failing these, her parents' relations, as they happen to be, succeed according to the order of succession to a childless woman's property, *q. v.*

To a betrothed girl's property given by her to-be husband,—first, the husband succeeds; in his default, the above-mentioned heirs succeed according to the above order.*

ORDER OF SUCCESSION TO THE STRÍ-DHANA OF A MARRIED WOMAN HAVING CHILDREN.

To her property received at the time of her nuptials (joutaka):†—	*To that received at any time other than that of her nuptials:*‡—	*To her property given by her father at any time soever.*§—
1 Unmarried daughter not betrothed.	1 Son, Unmarried daughter	1 The unmarried daughter,
2 Betrothed daughter,	2 The daughter having a son, The daughter likely to have a son,	2 Daughter having a son, Daughter likely to have a son,
3 Daughter who has a son, Daughter likely to have a son,	3 Son's son,	3 Barren daughter, (Sonless) widowed daughter,
4 Barren daughter, (Sonless) widowed daughter,	4 Daughter's son,	4 Son,
5 Son,	5 Son's grandson in the male line,	5 Daughter's son,
6 Daughter's son,	6 The son of a rival wife,	6 Son's son,
7 Son's son,	7 Her son's son,	7 Son's son's son,
8 Son's son's son,	8 Her son's grandson in the male line,	8 Son of a rival wife,
9 Son of a rival wife,	9 The barren daughter The (sonless) widowed daughter,‡	9 Her son's son,
10 Her son's son,		10 Her son's son's son.§
11 Her son's son's son,†		

ORDER OF SUCCESSION TO A CHILDLESS MARRIED WOMAN'S STRÍ-DHANA.

Given by her parents before marriage, her fee or gratuity, or bestowed after marriage:‖—	Other than that given by her parents before marriage, her fee or gratuity, or bestowed after marriage. If married according to the *bráhma, doiva, ársha, prájápatya,* or *gándharva* form.¶	If married according to the *ásura, ráksharsa,* or *poishácha* form:¶
1 The whole brother,	1 The husband,	1 The mother,
2 The mother,	2 The brother,	2 The father,
3 The father,	3 The mother,	3 The brother,
4 The husband.‖	4 The father.¶	4 The husband.¶

* See *ante*, pp. 231, 232.
† See *ante*, page 232—237.
‡ See *ante*, pp. 239—242.
§ *Ante*, pp. 243—245.
‖ See *ante*, pp. 246—248.
¶ See *ante*, pp. 248—250.

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SUCCESSION OF HEIRS AFTER THOSE AFORESAID TO ANY DESCRIPTION OF PROPERTY OF A WOMAN MARRIED ACCORDING TO ANY OF THE EIGHT FORMS.*

5	Husband's younger brother,	8	Husband's sister's son,	13	The *Sapindas*,
		9	Her brother's son,	14	The *Sakulyas*,
				15	*Samánodokas*,
6	The sons of the husband's younger and elder brothers,	10	Her son-in-law,	16	*Samána-gotras*,
		11	Her father-in-law,	17	*Samána-pravaras*,
		12	Husband's elder brother,	18	*Bráhmana*,
7	Her sister's son.			19	The King.*

* See *ante*, pages 250—256.

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BOOK III.

ON ADOPTION.

CHAPTER I.

ON GIVING, RECEIVING AND ADOPTING A SON IN DUE FORM, &c.

SECTION I.

A SON IS NECESSARY.

Vyavasthá. **310.** It is necessary for every Hindú to have a son for the presentation of oblations of food and libations of water, the discharge of his debts (spiritual and temporal), the attainment of future beatitude, and the continuance of his lineage.

Authority. *Vide* Precedents, page 435.

A Bráhmana, immediately on being born, is produced a debtor on three obligations: to the holy saints, for the practice of religious duties; to the gods, for the performance of sacrifice; to his forefathers, for offspring. Or, he is absolved from debt who has a son, has performed sacrifices, and practised religious duties.—*Dat. Mím.*, Sect. I, § 5.

Annotations.

310. The future beatitude of a man depending, according to prevalent superstition, on the performance of his obsequies and the payment of his debts by a son, as the means of redeeming him from an instant state of suffering after death. The dread is of a place called '*put*,' a place of horror, to which the *manes* of the childless are supposed to be doomed; *there* to be tormented with hunger and thirst, for want of those oblations of food and libations of water, at prescribed periods, which it is the pious, and indeed indispensable, duty of a son *(put-tra)* to offer.—Str. H. L., Vol. I, pp. 73, 74.

The etymology of the Sanskrit word for a son *(put-tra)* clearly evinces the necessity by which every Hindú considers himself bound to perpetuate his name. "Since the son delivers *(trâyate)* his father from the hell named '*put*,' he was, therefore, called '*put-tra*' by BRAHMÁ himself." A son of any description should be anxiously adopted by one who has no male issue, for the sake of funeral cake, water, and solemn rites, and for the celebrity of his name.—Macn. H. L., Vol. I, p. 63.

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MANU :—When he has paid three debts *to the sages, the manes, and the gods,* let him apply his mind to final beatitude: but low shall he fall, who presumes to seek beatitude without having discharged those debts. After he has read the *Vedas* in the form prescribed by law, has legally begotten a son, and has performed sacrifices to the best of his power, (and has paid his three debts,) he may then apply his heart to eternal bliss. But if a *Bráhmana* have not read the *Veda,* if he have not begotten a son, and if he have not performed sacrifice, yet shall aim at final beatitude, he shall sink to a place of degradation.—Chap. VI, *vs.* 35—37. Authority.

NÁRADA :—Fathers desire male offspring for their own sake, (reflecting) this son will redeem me from every debt whatsoever due to superior and inferior beings: therefore a son, begotten by him, should relinquish his own property, and assiduously redeem his father from debt, lest he fall to a region of torment. If a devout man, or one who maintained the sacrificial fire, die a debtor, all the merit of his devout austerities, and of his perpetual fire, shall belong to his creditors.—See *Coleb.* Dig., (Cal. Ed.,) Vol. I, p. 299. Authority.

VRIHASPATI :—He who having received a sum lent or the like does not repay it to the owner, will be born (hereafter, in his creditor's house, a slave, a servant, a woman, or a quadruped.—*Ibid.* Authority.

From passages of scripture, such as, "Or he is absolved from debt who has issue," &c., this precept resulting, "Let him procure absolution from debt through a son," it is established that the son, as being the instrumental cause of such absolution, is a means of completion.—*Dat. Mím.*, Sect. I, para. 38. Authority.

The precept, enjoining the production of a son, being positive, its result is, that the contravention of it is the cause of an offence.—*Dat. Mím.*, Sect. I, § 5. Authority.

Heaven awaits not one destitute of a son.—*Ibid.* Authority.

MANU and VISHNU :—Since a son delivers (*tráyate*) his father from the hell called '*put,*' therefore he is named '*put-tra*' by the Self-Existent himself.* Authority.

HÁRÍTA :—Certain hell is named '*put;*' and he who is destitute of offspring, is tormented in hell; a son is there- Authority.

* See *ante*, page 33. Note.

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fore called '*put-tra*,' because he delivers his father from those regions of horror.*

Authority. SHANKHA and LIKHITA :—A father is exonerated in his lifetime from the debt to his own ancestors, upon seeing the countenance of a living son: he becomes entitled to heaven by the birth of his son, and devolves on him his own debt. The sacrificial hearth, the three *Vedas*, and sacrifices rewarded with ample gratuities, have not the sixteenth part of the efficacy of the birth of an eldest son.*

Authority. MANU, SHANKHA, LIKHITA, VISHNU, VASHISHTHA, and HÁRÍTA :—By a son, a man conquers worlds; by a son's son, he enjoys immortality; and, afterwards, by the son of a grandson, he reaches the solar abode.*

Authority. YÁJNAVALKYA :—The attainment of worlds, immortality and heaven depend on a son, grandson, and great-grandson.*

Authority. *Mahá-bhárata* :—The sage MANDA-PÁLA desiring admission to a region of bliss, was repulsed by the guards, who watch the abode of progenitors, because he had no male issue.—See *Coleb.* Dig., Vol. III, p. 253.

Vyavasthá. **311.** For the reasons and purposes above stated, a son is necessary not only for householders (*grihi*), but also for persons of any of the other orders.†

Annotations.

311. A doubt might be entertained as to the validity of an adoption, by one not being in the order of the '*grihi*' (the householder), or by a blind, impotent, or other person disqualified from inheriting. The more correct opinion, however, appears to be that adoption by any of the persons described would be valid; though it seems reasonable that the affiliation of one excluded from inheritance should confer no right of succession on the adopted,‡ of which the adopter is debarred by law.—Sutherland's Synopsis, Head First.

The necessity of the thing applies, whether a man be single, married, or a widower; since to all, equally, his future state, according to his conception of it, is of the last importance.—Str. H. L., Vol. I, page 77.

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* See *ante*, page 33. Note. † See Section ii of this Chapter.
‡ See, however, the Chapter on Exclusion from Inheritance.

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The texts of MANU and the other sages cited in the two preceding pages. Authority.

This is recognized in the world and *Vedas*. VETÁLA and BHOIRAVÁ formerly went to a mountain to perform devotion. Previous to that they were unmarried, and sons of them are not mentioned, (as having been born or not born. If sons were born, O excellent of the regenerate,) we much wish to hear the particulars concerning them. MÁRKANDEYA replied: "Salvation is not for one destitute of male issue, both in the next world and in this: O excellent saints, those who are fathers of male issue, by means of their own sons, and those of brothers, attain heaven. Having in this world attained great perfection, when VETÁLA and BHOIRAVA reached the abode of the great deity, they were happy on the hill of *Koilása*. Then, O twice-born men, NANDÍ by the order of SHIVA, as one consoling addressed them, in private, in the following true and instructive speech:—'Do you, sons of SHIVA, destitute of male issue, exert yourselves in the production of a son. By one, to whom a son is born, everywhere salvation is easily attained.'" MÁRKANDEYA continued:—"Having heard these words of NANDÍ, they became elated in their hearts, and said to him: 'We will make one (son) only.' Accordingly BHOIRAVA, at some time, copulated with URVASHÍ, a celestial nymph, and procreated on her a son, named SUVESHA. VETÁLA also affiliated him as his son: and, in consequence, by means of this son, both attained heavenly salvation."—*Dat. Mím.*, Sect. II, § 45. Illustration.

"If, among several brothers of the whole blood, one have a son born, MANU pronounces them all fathers of a male child by means of that son." (MANU, Ch. IX, *v.* 182.) Although, according to this text, a man destitute of an own son is the father of a son by means of his brother's (*ourasa*) son, yet all the necessities of having one's own son are not thereby superseded; inasmuch as a son is required not only for the sake of the funeral cake, water, and solemn rites, but also for the celebrity of name, that is, continuance of lineage; but a nephew (unless adopted) cannot prolong his uncle's lineage.—See *Dat. Ch.*, Sect. I, § 26; also *Dat. Mím.*, Sect. II., para. 35, and 60—70. Authority.

MANU:—Many thousands of *Bráhmanas*, having avoided sensuality from their early youth, and having left no issue in their families, have ascended (nevertheless) to heaven.—Chap. V, *v.* 159.

YAMA:—Eighty-eight thousand holy sages of the sacerdotal class, superior to sensual appetites, and having left no

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male issue, have ascended (nevertheless) to heaven.—*Vide* Coleb. Dig., Vol. II, p. 464.

Conclusion. Although in the above texts it is illustrated that a man may, by means of devotional austerity, attain heaven, yet, in the present (*Kali*) age the production of a son must be looked to as the only means of exemption from the hell called '*put*,' and that of attaining celestial bliss, as such devotional austerity is impracticable, and such holy sages are rare, in the present age.

Vyavasthá. **312. A son is not, however, necessary for a woman whose husband has one adopted or born of another wife of his.***

Reason. Inasmuch as she is mother of a son by means of that son of her husband.

Authority. MANU :—If among all the wives of the same husband one bring forth a male child, MANU has declared them all, by means of that son, to be mothers of male issue.—Ch. IX, *verse* 183.

Authority. The son of a rival wife, originating immediately from portions of the husband, bears, though unadopted, the relation of son to another wife.—See *Dat. Mím.*, Sect. II, § 70. See also Section ii of this chapter.

ARTICLE II.

WHERE A SON LEGITIMATELY BEGOTTEN (*ourasa*) IS WANTING, A SUBSTITUTE FOR HIM IS NECESSARY.

313. A person destitute of a legitimate son begotten by himself *(ourasa)*, must anxiously adopt a substitute for such son.

Vide Precedents, page 435.

Annotations.

312. The same reason, which imposes the necessity of adoption on a man, not equally applying to a woman, the latter (at least such seems to be the more accurate and prevailing doctrine) is incapable in her own right of adoption, though it is admitted that by his sanction she may affiliate, on the part of her husband, a son who would necessarily be filially related to herself.—Sutherland's Synopsis, Head First.

* See Section ii of this Chapter.

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MANU:—A son of any description must be anxiously adopted by a man destitute of male issue (*a*), for the sake of the funeral cake, water, and solemn rites (*d*), and for the celebrity of his name.* Authority.

ATRI:—By a man destitute of a son (*b*) only, *must the substitute for* a son of some one description, always (*c*) be anxiously adopted: for the sake of the funeral cake, water, and solemn rites (*d*).* Authority.

(a) "By a man destitute of male issue:"—that is, by one to whom no son may have been born, or whose son may have died; for, a text of SHOUNAKA expresses: "One destitute of a son or one whose son may have died, having fasted for male issue," &c.—*Dat. Ch.*, Sect. I, § 4. Exposition.

(b) "By a man destitute of a son."] The word son, here used, is inclusive also of the son's son and grandson (in the male line), for through these the exclusion from heaven denounced in such passages as "heaven awaits not one destitute of a son," is removed; since it is declared in the text subjoined, that mansions of the happy are attained through the grandson, and the other. "By a son a man conquers worlds: by a son's son he enjoys immortality; and afterwards by the son of a grandson he reaches the solar abode."—*Dat. Mim.*, Sect. I; § 13. Exposition.

The term "male issue," (*put-tra*,) here used, is inclusive of the grandson and great-grandson (in the male line); for these equally present oblations of food, and preserve the line. Otherwise, it would follow that the adoption of a son, by one whose son had died, notwithstanding the existence of a grandson (in the male line), were without reason. It therefore results that, only one destitute of a son, grandson, and great-grandson (in the male line), may adopt.—*Dat. Ch.*, Sect. I, § 6.

Therefore, although by the production of a son, the exemption from debt, deduced from the text of MANU subjoined, may have taken place, still, on the death of such son, for the sake of funeral rites, the affiliation of another son is indispensable. "By the eldest, at the moment of birth, a man becomes father of male issue, and absolved also from debt to his progeniters."—*Ibid.*, § 5. Conclusion.

"By a man destitute of a son, &c."—Since it is shown by this, that the being so destitute is a cause; in omitting to adopt a son, an offence even is incurred; for the precept en- Authority.

* *Dat. Mim.*, Sect. I, § 3. See *Dat. Ch.*, Sect. I, § 3, where the term "male issue" is used instead of "a son."

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joining the production of a son being positive, it results that the contravention of it is the cause of an offence; and on defect of any son in general, exclusion from heaven is declared in this text: "Heaven awaits not one destitute of a son, &c."—*Dat. Mím.*, Sect. I, § 5.

Exposition. "By a man destitute of a son only."—The incompetency of one having male issue is signified by the term "only" in this passage.—*Ibid.*, § 6.

Explanation. *(c)* The term "always" signifies that, in the present case, no definite "period is required, as in such cases as (that contemplated in this passage) "the barren woman, in the eighth year, is to be superseded."—*Dat. Mím.*, Sect. I, § 53.

Explanation. *(d)* "*The funeral cake*,"—the *Shráddha* or funeral repast. "*Water*"—that is, the presenting of water in the two united palms, and so forth. "*Solemn rites*,"—meaning rites in honor of the deceased, cremation and the like.—*Ibid.*, § 54, 55.

Cause. These are the cause (*hetu*). The reason occasioning the adoption is the cause. This, from being used in the singular number, shows that these ceremonies, collectively, are the cause, and not individually; and consequently, the meaning is, that there is not a distinct affiliation severally for each, but one adoption only on account of the whole: for on default of a son, the failure of the oblations of food and other rites is the consequence.—*Ibid.*, § 54, 55.

Remark. The causes assigned as above by the author of the *Dattaka-mímánsá* are not, however, all, the celebrity of name, that is, prolonging lineage, being another cause of adoption assigned by MANU. The author omitting that cause, cites only those in the text of ATRI, namely, funeral cake, water, and solemn rites. Had these been all, there was no necessity of adopting a son, while a brother's son existed; since he could perform all those acts just as a son. The author of the *Dattaka-chandriká*, considering the prolonging of lineage to be the principal cause of adoption, has asserted that it is necessary to adopt a son notwithstanding there be a brother's son to present the oblations of food, libations of water, and to perform the solemn rites. This assertion of his appears to be very just, inasmuch as even the presentation of the oblations of food and libations of water must in some remote period cease without the celebrity of name, that is, continuance of the lineage, which therefore is the principal cause of adoption. Thus a son is adopted not only for the sake of the funeral cake, water, and solemn rites, but also for

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prolonging the lineage, all which, collectively, not singly, constitute the cause of adoption.

314. The substitute for a son is necessary, notwithstanding a widow's capacity to present the oblations of food and libations of water to the *manes* of her husband. *Vyavasthá.*

Since her presentation of the oblations of food and libations of water to her deceased husband alone does not obviate the necessity for having a son, who is adopted chiefly to perform the *párvana Shráddha,** to deliver the adopter from the hell called '*put,*' and to prolong his lineage, which acts are beyond the capacity of a widow to perform. Reason.

"On failure of the son, let the wife be," &c.†—Although by this and other passages the capacity of the wife, and other (heirs) also, to perform the obsequies, is declared, still it must be unquestionably affirmed that from the authority of such passages as this—("Heaven awaits not one destitute of a son,") the mansions of the happy attainable by obsequies, performed by a son, are not acquired by such rites performed by the wife and the rest. For, otherwise, the wife and other heirs of one destitute of male issue, being competent to perform rites, which would be equally effective, the specification of failure (of the son) would be unmeaning; as an alternative results from such equality. Hence, for the acquisition of some particular heaven, to be obtained by obsequies performed by a son, the substitute for a son is indispensable.—*Dat. Mím.*, Sect. I, § 58, 59. Authority.

"If among several brothers of the whole blood, one have a son born, MANU pronounces them all fathers of a male child by means of that son."‡ "Let the nephew of a paternal uncle, destitute of male issue, be his son: he only should perform his obsequies of the funeral repast, and oblations of food and water."§ "Those who are fathers of male issue, by means of their own sons, and those of brothers, are completely saved."||

Although, in the texts above cited, a brother's son is considered to be a son of his uncle, yet the necessity for the

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* See *ante*, page 20.

† SHANKHA :—The sequel is this, "(the performer of the funeral rites ;) on her default, the whole brother."—*Dat. Mím.*, Sect. I, § 58. Note.

‡ MANU, Ch. IX, *v.* 182.

§ *Vrikat* PARÁSHARA. See *Dat. Mím.*, Sect. ii, § 53.

|| *Káliká-purána. Ibid.*, § 45.

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substitute for one's own son is not wholly superseded by a brother's son, inasmuch as he cannot prolong his uncle's lineage, unless legally adopted. Consequently,—

Vyavasthá **315. The substitute for a son is necessary, notwithstanding the existence of a brother's son.***

Authority. As the capacity of prolonging lineage does not obtain in a brother's son, although such son may exist, he, (or if any impediment exist,) another must be affiliated, as a son given, and so forth: there is in this respect a material difference.—*Dat. Ch.*, Sect. I, § 26.

Authority. The position, that the son of a brother, though unadopted, bears filial relation to his paternal uncle, on account of the text of *Vrihat* PARÁSHARA, above cited, is refuted. For, without an act of the adoptive parent, filiation, as his son, is not accomplished. Therefore, the texts of MANU and *Vrihat* PARÁSHARA are not pertinent, to the extent of their verbal import; for, thirteen descriptions of sons would be the consequence.—See *Dat. Mím.*, Sect. II, § 53, 55.

Authority. And, moreover, the assigning, in the following text, of the fifth place, in the order of succession to the estate of one, who died without male issue, would be contradicted. "The wife, and the daughters, also both parents, brothers likewise, and their sons,"† &c. The exposition of this is thus: "If the brother's son, though unadopted, bear filial relation (to his uncle), the enumeration of the brother's son, on account of his wanting such relation, in the fifth place, in the order of succession to one dying without male issue, would be contradicted. The same also must be understood, in respect to the right in gradation, to perform the obsequies, as declared in this and other texts: "The son, the son of a son, the son of a grandson: like these, the offspring of a brother, or that of a *sapinda* also, are born, Oh king! capable of performing obsequies."—*Dat. Mím.*, Sect, II, paras. 59, 60.

Annotations.

315. It is true that a brother's son, as such, inherits, and performs obsequies to his uncle, dying without preferable heirs; but then it is *as* his nephew, not as his son; and the spiritual efficacy, in the one and the other case, is considered to be different. To render him a substitute for a son, he must have been affiliated.—Str. H. L., Vol. I, p. 86.

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* See Section ii of this Chapter. † YÁJNAVALKYA. See *ante*, page 29.

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Moreover in the case where of ten whole brothers, five have each ten sons, and five are wholly destitute of male issue, it would follow that the five brothers destitute of male issue would have each fifty sons; and it would also result that the fifty sons would severally have ten fathers; thus there would be a great absurdity. Nor would an intended consequence thus result: for, in the passage ("a substitute for a son must be adopted,") unity, ascribed to the object to be adopted, is of definite import; and the singular number, used in the following passage, to express, severally, both the male issue, and the father of the same, would be contradicted. "If one, among brothers of the whole blood, be possessed of male issue, MANU pronounces that they all are fathers of the same by means of that son."—*Dat. Mím.*, Sect. II, § 64, 65. Authority.

Neither must it be alleged that, because the plurality of brothers' sons is mentioned in this passage ("those who are fathers of male issue, by means of their own sons, and those of brothers, are completely saved,") many brothers' sons, even though unadopted, may be sons of one person: for, from occurring in respectful modes of expression, in which, by popular acceptation, the plural number is used, it has an indefinite import: also, the injunctive precept proposed, being accomplished in our opinion by means of one only, the propounding of many would be contrary to sense and law.—*Ibid*, Sect. II, § 66. Therefore,— Authority.

316. Every person to whom no *ourasa* son has been born, or is not to be born, or being born has died without leaving a son, or a son's son, is under the necessity of adopting a substitute for such son.* *Vyavasthá.*

Vide precedents, pages 435—437.

Annotations.

316. Marriage is to be contracted in order to have a son, and a son is required to perform the obsequies; so marriage failing in this most important object, *viz.*, the production of an *ourasa* son, (*i. e.*, a son begotten by the man himself in lawful wedlock,) or in the event of a man not being married, or losing his wife before begetting a son, recourse is necessarily had to the adoption of an artificial son substituted for the *ourasa*, in order that obsequies might not go unperformed, and the celestial bliss be forfeited.—See Str. H. L. Vol. I. pp. 74, 75.

* See *ante*, pp. 264—269, and the Section next following.

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Vyavasthá. **317.** The substitute for a son legitimately begotten *(ourasa)* was generally of eleven descriptions.

Reason. There being generally twelve descriptions of sons, including the *ourasa* or the son legitimately begotten.

Authority. They are thus described by YÁJNAVALKYA:—1, "*The legitimate son of the body* is one who is produced by a lawful wife; 2, *the appointed daughter* or *her son* is equal to him; 3, *the son of the* (*soil*, or) *wife* is one begotten on her by an appointed kinsman sprung from the same original stock (with her husband), or by another person duly authorized; 4, *a male child, secretly brought forth* (by a married woman) in the mansion (of her lord), is considered as a son of concealed birth; 5, *the Kánína*, or *son born of a young woman unmarried*, is considered as the son of his maternal grandfather; 6, *a son of the twice-married* is one born of a woman (by a second marriage), whether she be at the time of this marriage deflowered or not; 7, *a son given* is one who is made a gift of by his father or mother; 8, *the son bought* is one sold by his parents; 9, *a son made* is one (born of other parents and) adopted by a man himself; 10, *a son self-given* is he who gives himself to another; 11, *a son of a pregnant bride* is one accepted while yet in the womb of the bride; 12, he who is taken in adoption having been forsaken by his parents is a *deserted* son."*

Authority. MANU also enumerates twelve sons, including the legitimately begotten one (*ourasa*), but in some respects he differs from YÁJNAVALKYA. His enumeration is as follows:—1, "The son begotten by a man himself (in lawful wedlock); 2, the son of his wife (begotten in the manner described); 3, a son given (to him); 4, a son made (or adopted); 5, a son of concealed birth (or whose real father cannot be known); and 6, a son rejected (by his natural parents), are the six kinsmen and heirs; 7, the son of a young woman (unmarried); 8, the son of a pregnant bride; 9, a son bought; 10, a son by a twice-married woman; 11, a son self-given; and 12, a son by a *Shúdrá*, are six kinsmen, but not heirs (to collaterals)."† "Sages declare these eleven sons,—the son of the wife and the rest,—as specified, to be substitutes for the legitimate son (of the body), for the obsequies would fail (*kriyá-lopát*)."‡

Remark. The twelve sons enumerated by MANU are really thirteen in number, as said by VRIHASPATI:—"Of the thirteen sons

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* *Mitákshará*, Ch. I, Sect ix, § I;—*Vi. Chi.*, p. 288;—*Coleb.* Dig., Vol. III, pp. 160, 210, 224, 235, 241, 273, 275, 276, 278, and 279.

† Chap. IX, *vs.* 159, 160. ‡ *Dat. Mím.*, Sect. I, § 33.

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who have been enumerated by MANU, in their order, the legitimate son and appointed daughter are the cause of lineage. As oil is substituted by the virtuous for liquid butter, so are eleven sons, by adoption, substituted for the legitimate son and appointed daughter."—*Dat. Ch.*, Sect. I, § 8.

It appears that the twelve sons enumerated by MANU have been reckoned as thirteen, by enumerating the appointed daughter or her son as distinct from the legitimate son of the body, which two have been reckoned by MANU to be one and the same in effect, and expressed by the term '*ourasa.*' (See MANU, Ch. IX, *vs.* 130, 132, 133.) **Remark.**

According to the calculation of some authorities, the number of sons, including the *ourasa*, is extended even to fifteen, as in the following text of law quoted in the *Dattaka-mímánsá*:—" 1, The legitimate son; 2, the apppointed daughter; 3, the son begotten on another's wife; 4, the son of the wife; 5, the son of an appointed daughter; 6, the son of a twice-married woman; 7, the damsel's son; 8, the son received with (in the womb of) a pregnant bride; 9, the son of hidden origin; 10, the son given; 11, the son purchased; 12, the son self-given; 13, the son made; 14, the deserted son; and 15, the son born of a woman of unknown caste, are the fifteen sons of a man." (Sect. II, § 57.) **Remark.**

These, plus the son of a *Shúdrá*, amount to sixteen. But the appointed daughter and the son of an appointed daughter being reckoned to be one, and the son begotten on another's wife and the son of the wife being assumed to be one, and the son of a *Shúdrá* woman, and the one born of a woman of unknown caste, being omitted, sons are principally enumerated to be twelve,* as specified by YÁJNAVALKYA.—See *ante*, page 274. **Remark.**

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* Out of the ten lists, exhibited in the Digest, only three authorities besides MANU included the *Shoudra* (the son of a *Shudrá* woman, married or unmarried by any other than a *Shúdra* father) as one of the twelve legal sons. These are VISHNU, SHANKHA, and LIKHITA, with the *Káliká-purána;* VISHNU, and the *Káliká-purána*, together with MANU, omitting the *putriká-putra*, as being identified with the son born in wedlock, which SHANKHA and LIKHITA admit; the latter omitting the *Kritrima*, or son made, as included (it may be) in the *Dattaka*, or son given.

VISHNU as well as MANU makes the son of a *Shúdrá* woman the twelfth, calling him "a son any how produced irregularly." He is said by MANU to be begotten through lust on a *Shúdrá* woman, married or unmarried, by a man of the priestly class. So that, however competent to confer some benefits on his putative father, he was even degraded as a corpse though alive, and thence (in law) called "a living corpse." It is for these reasons that he is not reckoned as a son by the other legislators. See MANU, Ch. III, *vs.* 15, 16; Ch. IX, *v.* 178. See also Coleb. Dig. Vol. III, pp. 117, 119, 144, 283, 284; and Str. H. L. Vol. II, pp. 210—212.

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Conclusion. The author of the *Dattaka-mímánsá* has, in the following words, concluded the number of the sons to be twelve: "It is established that there is no contradiction of the number twelve; for the several enumerations in each authority are consistent; since, in some, particular sons are implied, and in others, expressed."—Sect. II, § 58.

On failure of the legitimate son the son of the wife and the rest (as aforesaid) are ordained to be an eleven-fold substitute. (*Dat. Mím.*, Sect. I, § 52.)—"On failure of the first respectively invest the next with filial rights." (*Káliká-purána.*)—See *Coleb.* Dig., Vol. III, p. 155. Nevertheless,—

Vyavasthá. **318. Of the several sons,—the son of the wife and the rest,—generally speaking, the *Dattaka* (the son given), can at present be made a substitute for the *ourasa* son.**

Vide Precedents, pages 438, 440—442.

Annotations.

318, 319. On the subject of son, to be affiliated in the present age, the two texts of law quoted in *Dat. Ch.*, (Sect. I, § 9,) are usually cited. The term 'son given,' occurring in the latter, is explained in the *Vyavahára-mádhava*, and other works, as likewise denoting the 'son made.'—The *putriká-putra* does not appear to be regarded as a subsidiary son, and it is not unreasonable to infer that the affiliation of such son, would be valid in the present age. The term '*ourasa*' or legitimate son, occurring in the text noticed, might consistently be construed as also indicatory of the *putriká-putra*. This term is used to denote a daughter appointed to be a son, the one appointed to raise up (male) issue, and the son of either. YÁJNAVALKYA declares the *putriká-putra* to be equal to the real legitimate son, and MANU propounds that there is no difference between a son and an appointed daughter, and a son's son and the son of such daughter. Further, an equal division of the heritage is ordained between the *putriká-putra* and real legitimate son.—Note I, appended by Mr. Sutherland to his Synopsis, Head First.

318, 319. Now, these two, the son by birth, emphatically so called, (*Ourasa*) and (*Dattaka*,) the son by adoption, meaning always the son given, are generally speaking the only subsisting ones allowed to be capable of answering the purpose of son; the rest, and all concerning them, being parts of ancient law, understood to have been abrogated, as the cases arose, at the beginning of the present, the *Kali* age.—Str. H. L. Vol. I, p. 75.

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Authority.

Of these, however, in the present age, all are not recognised. For a text recites:—"Sons of many descriptions, who were made by ancient saints, cannot now be adopted by men, by reason of their deficiency of power;"—and against those, other than the son given, being substitutes, there is a prohibition in a passage of law, wherein, after having been premised,—"The adoption, as sons of those other than the legitimate son, and son given,"—it is subjoined,—"These rules sages pronounce to be avoided in the *Kali* age."—*Dat. Ch.*, Sections I, and IX.

Authority.

"Sons of many descriptions, who are made by ancient saints, cannot now be adopted by men, by reason of their deficiency of power," &c. On account of this text of VRIHASPATI, and because in this passage, ("There is no adoption, as sons of those, other than the son given and legitimate son," &c.,) other sons are forbidden by *Shounaka* in the *Kali* or present age; amongst the sons, however, (who have been mentioned), the son given, and the legitimate son only, are admitted.—*Dat. Mím.*, Sect. I, § 64.

Authority.

Smriti:—The filiation of any but a son legally begotten or given in adoption (by his parents); the desertion of a wife for any offence less than adultery: these (parts of ancient law) were abrogated by wise legislators, as the cases arose at the beginning of the *Kali* age, with an intent of securing mankind from evil.—*Madana-ratna-pradípa.* See the general note appended by Sir William Jones to his translation of the Institutes of MANU, page 365. But,—

The son made (*kritrima.*)

The sage PARÁSHARA, whose ordinances are said to be the supreme authority in the present (*Kali*) age,* having ordained that the son made (*Kritrima*) is not abrogated in the present age,† and accordingly the *Dattaka-mímánsá, Vyavahára-mádhava, Mitákshará,* and some other books of high authority having declared that the term *Dattaka* (given) is inclusive also of the son made (*Kritrima*), the adoption of sons in the *Kritrima* form is made in *Mithila* and some other provinces(1), but not in Bengal.

Annotations.

(1.) It should be premised, that in the present age, amongst the various subsidiary sons recognised in codes of law, according to the

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* See the Preface.

† By PARÁSHARA, author of one of the *Shanhitás* or institutes (referring to the Hindú divison of the world into four ages), are assigned, as appropriate to the *Krita-yuga* or the first age, the Institutes of MANU, to the *Tretá*, or second, the ordinances of GOUTAMA, to the *Dwápara*, or third, those of SHANKHA and LIKHITA, and to the *Kali* or fourth (the present sinful age as it is deemed) his (PARÁSHARA's) own ordinances.

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The *putriká-putra.*

Filiation in the form of *putriká-putra* (an appointed daughter or her son) also does not appear to have been abrogated, such son being considered by MANU, VASHISHTHA, SHANKHA and LIKHITA, and in the *Káliká-purâna,* to be identical with the son legally begotten (*ourasa*), and by other legislators to be like, or equal to, the latter. Thus :—

Authority.

MANU :—He, who has no son, may appoint his daughter in this manner to raise up a son for him, *saying* :—"The male child who shall be born from her in wedlock shall be mine, for the purpose of performing obsequies."—Chap. IX, *verse* 127.

Authority.

MANU :—Between a son's son and the son of *such* a daughter there is no difference in law; since their father and mother both sprang from the body of the same man.—Chap. IX, *v.* 133.

Authority.

VASHISHTHA :—This damsel who has no brother, I will give unto thee, decked with ornaments; the son who may be born of her shall be my son.—*Coleb.* Dig., Vol. III, page 171.

Authority.

SHANKHA and LIKHITA :—Between a son, and the son of such an appointed daughter, there is no difference.—*Coleb.* Dig., Vol. III, p. 183.

Remark.

In fact, the appointed daughter becomes a son when the declaration runs in this form—"This daughter shall raise up offspring to me, as if she were my son."—*Ibid.*, p. 171.

Authority.

YÁJNAVALKYA :—The legitimate son (*ourasa*) is one procreated on the lawful wedded wife. *Equal* to him is the son of an appointed daughter.—*Mit.* In., Chap. I, Sect. xi, § 1.

Annotations.

authority of writers, confirmed by practice, only those technically denominated, the son given (*Dattaka* or *Dattrima*), and the son made (*kritrima* or *krita*) are capable of being affiliated. The author of the *Dattaka-chandriká,* indeed, admits the son given alone. In effect, however, without any great latitude, a son self-given, and a son rejected, might perhaps be included under the general denomination of the son made, the *Kritrima* or *Krita-putra* (vulgarly called *Kartá-putra*), and it should not be omitted, that in the treatises of law, the term *Dattaka,* or son given, is sometimes used to denote an adopted son generally.—Sutherland's Synopsis, (2nd Ed.,) p. 147.

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BOUDHÁYANA :—A boy born of a daughter expressly appointed *to raise up issue for the father,* is the son of an appointed daughter; any other is merely a daughter's son.—*Coleb.* Dig., Vol. III, p. 167. Authority.

VASHISHTHA :—She who has no brothers acquires filiation reverting to the family of her ancestors; the appointed daughter is considered as the third son, but *equal* to the son of the body, for she performs his duties.—*Ibid.*, p. 162. Authority.

SHANKHA and LIKHITA :—"The son of PRACHETAS has said, "The appointed daughter is *like* a son."—*Ibid.*, p. 163. Authority.

A daughter appointed to raise up a son, is *like* unto a son; that is, she is equal to a son, because she performs his duties. So says DAKSHA, the son of PRACHETAS.—*Ibid.*, page 163. Remark.

GOUTAMA :—He who has no male issue may appoint his daughter to raise up a son for him, making an oblation to fire, and performing the sacrifice called '*prajá-pati*' (or *prájápatya*), declaring "her offspring shall belong to me:" but according to some, she may be simply appointed by implied intention.—*Ibid.*, p. 190. Authority.

MANU :—The son of a daughter, *appointed in the manner directed,* shall inherit the whole estate of his father, who leaves no *other* son.*—*Ibid.*, p. 165. Authority.

MANU :—The son of a man is even as himself; and as the son, such is the daughter *thus appointed:* how then, *if he have no son,* can any inherit his property but a daughter, who is closely united with his own soul.—Chap. IX, *v.* 130. Authority.

The *Brahma-purána* :—Such a daughter receives an equal share of the patrimony.—*Coleb.* Dig., Vol. III, p. 164. Authority.

VRIHASPATI :—One alone, namely, the son of the body, is declared to be the owner of the wealth *left* by his father; an appointed daughter is equal to him; but the other sons shall only be maintained.—*Ibid.*, p. 171. See *ante,* pp. 274, 275. Authority.

MANU :—But a daughter having been appointed to produce a son for her father and a son *begotten by himself* being afterwards born, the division of the heritage must, in that case, be *equal,* since there is no right of primogeniture for a woman.—*Coleb.* Dig., Vol. III, p. 164. Authority.

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* The gloss compels me to alter the translation. See MANU, Chap. IX, verses 131. Note by Mr. Colebrooke.

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Remark. By saying this, MANU shows that an appointed daughter may claim the heritage; and in the following text he declares her son becoming a son's son *in the contemplation of the law.—Ibid.*

Authority. MANU:—By that male child whom a daughter, thus appointed, either by an implied intention, or by a plain declaration, shall produce from a husband of equal class, the maternal grandfather becomes in law the sire of a son's son: let that son give the funeral cake, and possess the inheritance.—*Ibid.*

Remark. The *Dípa-kaliká*, in explaining the text of YÁJNAVALKYA:—"The son of an appointed daughter is *equal* to him," (*ante*, p. 274) has this remark:—'He shall have an equal share with the son of the body.' MISRA concurs therein.—*Ibid.*

Conclusion. Thus the *putriká-putra* (the appointed daughter or her son) being declared by MANU to be identical with a legitimate son of the body (*ourasa*), and by VRIHASPATI not to be an *adopted son*, and, moreover, she being entitled to take heritage *equally* with the latter, the former is not, according to MANU and some other legislators, one of the subsidiary sons,* (who take heritage in a less degree than the legitimate son,) and not being considered to be so by MANU, the filiation of the *putriká-putra* cannot be held to have been abrogated (1); because the ordinances of MANU are to

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Annotations.

(1) The *putriká-putra* does not appear to be regarded as a subsidiary son, and it is not unreasonable to infer that affiliation of such a son would be valid in the present age. The "*Ourasa*" or "legitimate son," in the text noticed, might consistently be construed as also indicatory of the "*putriká-putra*." This term is used to denote "a daughter" appointed to be a son to raise up issue, and the son of either. YÁJNAVALKYA declares the *putriká-putra* to be *equal* to the real legitimate son.† And MANU propounds that there is no difference between a son and an appointed daughter, and a son's son, and the son of such daughter.‡ Further, an equal distribution of heritage is ordained between the *putriká-putra*, and a real legitimate son subsequently born.—Note I, appended by Mr. Sutherland to his Synopsis, page 147, (2nd Ed.)

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* VASHISHTHA, 17, 16.

* The appointed daughter is mentioned by MANU separately from the thirteen sons. She is not male, and therefore not under the same head with sons.—*Coleb.* Dig., Vol. III, p. 171.

† See *ante*, page 274. ‡ See *ante*, page 274.

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be followed in preference to the *Smritis* of all other legislators. Thus VRIHASPATI:—"MANU holds the first rank among the legislators, because he has expressed in his code the whole sense of the *Veda*; no code was approved which contradicted MANU."

319. But although the filiation in the form of the *putrikâ-putra* may not be deemed to be abrogated, yet such filiation appears to be obsolete at the present time. *Vyavasthâ.*

Vide Precedents, page 438.

The *Krita-putra* (or son bought) is seen amongst the ascetics or devotees who are not house-holders (*grihî*), but whose practice it is to buy boys and maintain them as adopted sons, though they cannot be so unless formally adopted The son bought (*Krita*).

Annotations.

VISHNU and the *Kâlikâ-purâna*, together with MANU, omitting the *putrikâ-putra*, as being identified with the son born in wedlock, which SHANKHA and LIKHITA admit; the latter omitting the *Kritrima*, or son made, as included (it may be) in the *Dattaka* or son given.—Stra. H. L., Vol. II, p. 210.

Next, in the enumeration of MANU, is the *Kshetraja*,§ who will be presently noticed; but it may be convenient to interpose here an account of the *putrikâ-putra*, or son of an appointed daughter; who in some texts (as in those of YÂJNAVALKYA and DEVALA) stands second; in others, lower down; having no separate place in MANU's, for this reason, that, according to him, and the authorities following him, he was identified with the *ourasa*, or legitimate son; there being between such a son and a man's own, no difference in law; so that both co-existing, the division of the heritage is to be equal. He (the *putrikâ-putra*) was of two kinds; the appointed daughter's son, and, by a laxity in language, the daughter herself appointed to be a son; in which latter case, she performed the obsequies of her father; the difference consisting in the forms of appointment, according to which the appointed daughter or her son became substituted as an adopted. * * * It remains to add, as resting upon the authority of the most respectable opinions, that not regarding the *putrikâ-putra*, as a subsidiary son, his affiliation (it would not be unreasonable to infer) would be valid in the present age.—Stra. H. L., Vol. II, pp. 199—201.

§ See *ante*, pages 274—276.

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according to the *Shástra.* They, however, are sometimes considered as *pálita* (vulgarly called '*pálaka*) *putras,*'* but generally as *chelás* (disciples), in which latter capacity they inherit from their supporters who are also their *Gurus* or spiritual guides, according to the custom of the *Maths* or Monasteries of each Sect. (1). But,—

Annotations.

(1) Sir William Macnaghten says :—" I have laid it down as a rule that in the present age adoption is allowable only in the *Dattaka, Dwyámushyáyana* and *Kritrima* forms; but I find on reference to the Elements of Hindú law, that a question was agitated as to the admissibility of the *Krita,* or son bought. The point was much canvassed, and gave rise to a protracted controversy between two of the most eminent scholars of the day; and there is a case in the Sudder Dewany Adawlut Reports, (Vol. I, p. 28,) in which the claimant was alleged to be of the *pounarbhava* class; and in which in all probability the claim would have been adjudged, had it not been proved to be customary for sons of that description to succeed. Although, therefore, it may be asserted that, generally speaking, there are only three species of adoptions allowable in the present age, yet the rule should be qualified by admitting an exception in favor of any particular usage which may be proved to have had immemorial existence.† Thus it appears that the *Goswámis,* and devotees who lead a life of celibacy, buy children to adopt them in the form of *Krita,* or sons bought; and that the practice of appointing brothers to raise up male issue to the deceased, impotent or even absent husbands, still prevails in *Urissa.* (Note to 3 Dig., 276.) The son so produced is termed *Kshetraja,* or son of the wife; and, doubtless, these several sorts of subsidiary sons should be held entitled to patrimony of their adopting fathers, in places where *lex loci* would justify the filiation. (See S. D. A. R., Vol. II, p. 175.)"—Macn. H. L., Vol. I, pp. 101, 102.

Here it should be remarked that the claimant in the abovementioned cause was alleged to be illegitimate, not *pounarbhava,* and there is much difference between these two. Be that as it may, both of them, as well as any other description of sons, would be valid wherever the custom of adopting such a son or sons prevailed from time immemorial. As to the mention of the *Goswámis* and other

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* *Pálaka-putras,* or boys supported as sons, not being adopted according to the *Shástra,* do not, and cannot, inherit, except by custom.

† See Usage or Custom at pp. 117—122 of Part I.

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320. The adoption of a son bought (*Kríta*) by a *grihí*, or householder, is obsolete and invalid in the present age: the so-called adoption of boys bought by ascetics is not according to law but usage, which, wherever it obtains, supersedes the general maxims of law. *Vyavasthá.*

Vide Precedents, pages 438, 441.

321. Boys or girls merely supported as sons or daughters are called *pálita-putras* or *pálita-kanyás* (vulgarly—'*pálak putras*,' or '*pálak kanyás*') of their supporters; but not being adopted according to the *Shástra*, the former cannot become such sons or daughters as are legally entitled to inherit from the latter. *Vyavasthá, pálaka-putra.*

Vide Precedents, pages 440, 441.

Annotations.

devotees buying boys, it is to be remarked that they indeed buy boys and maintain them as sons, rather as disciples, but nevertheless they do not adopt them according to the *Shástra*, as sons bought. Such maintained disciples become their heirs merely according to custom.* Mr. Colebrooke's observation on this subject as contained in the Elements of Hindu Law (p. 108, Vol. I,) appears therefore to be quite correct. The same is as follows:—"On this side of India adoption by purchase is obsolete, and considered to have been prohibited in the present sinful age of the world: the only practice analogous to it is the purchase of children by *Goswámís* or Gosains, *Sanyásis* and other professed ascetics, for initiation into their order of devotion, the disciple becoming the heir of the master. This, however, is not adoption, but a practice grounded on other provisions of the Hindu Law, and on the peculiar customs of the mendicant tribes."

321. The question as to the validity or otherwise of the adoption of a son bought was, at the instance of Sir Thomas Strange, much agitated in the court of the Rajah of Tanjore, and His Highness' *pandits* (13 in number), after much discussion on the subject, gave their opinion in the negative, the last and conclusive part of which is as follows:—"Therefore, upon the whole, adoption after purchase being like the flower in the sky, it is plain to us that sale

* See pp. 114—122 of Part I.

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Authority. When a son is given by the natural father, and received by the adopter, with the stipulation of being the son of both, he becomes a *Dwyámushyáyana* (son of two fathers.)

Vyavasthá. **322.** The adoption in the *Dwyámushyáyana* form is neither abrogated nor obsolete, inasmuch as the *Dwyámushyáyana* son is the same as the *Dattaka* (given) son, only qualified as above.*

Authority. In former times daughters were adopted on defect of legitimate (*ourasa*) daughters; as is apparent from clauses 1—38, section vii of the *Dattaka-mímánsá.* But such affiliation is obsolete in the present age.

SECTION II.

WHO IS, OR IS NOT, COMPETENT TO ADOPT A SON.

Vyavasthá. **323.** Not only a married man, with or without a wife, being destitute of a son, and (in the male line) a grandson, and great-grandson, *capable* of performing the exequial rites, but also an unmarried man, can validly adopt a son.†

Vide Precedents, pages 454, 455, 504.

Annotations.

and purchase can be no foundations for the boy bought being considered as heir to the purchaser."—See Stra. H. L., Vol. II, pages 187—191.

323. The necessity of the thing applies, whether a man be single, married, or a widower: since to all, equally, his future state, according to his conception of it, is of the last importance. * * * In general, it is in default of male issue that the right is exercised; *issue* here including a grandson and great-grandson (in the male line).—Str. H. L., Vol. I, pp. 77, 78.

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* The above form of adoption will be fully treated of in its proper place.

† See post, pp. 285—290.

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The *Dattáka-mímánsá*, Sect. II, § 45. The *Dattaka-chandriká*, Sect. I, § 28. See *ante*, pages 269, 270. Authority.

324. A man who is not a *grihí* (householder) has also a right to adopt a son. *Vyavasthá.*

Vide Precedents, pages 455—458.

The *Dattaka-mímánsá*, Sect. II, § 45.—See *ante*, pages 266—268, *et seq.* Authority.

It should be here remarked that no law is to be found expressing that a son shall not be adopted by one who has not contracted a marriage.—*Coleb.* Dig., Vol. III, p. 252. Authority.

Annotations.

The primary reason for the affiliation of a son, being the obligatory necessity of providing for the performance of the exequial rites, celebrated by a son for his deceased father, on which the salvation of a *Hindú* is supposed to depend, it is necessary that the person proceeding to adopt, should be destitute of issue male, *capable* of performing those rites. By the term 'issue,' the son's son and grandson (in the male line) are included. It may be inferred, that if such male issue, although existing, were disqualified by any legal impediment (such as loss of caste,) from performing the rites in question, the affiliation of a son might legally take place.—Sutherland's Synopsis, Head First.

324, 325. A doubt might arise as to the validity of an adoption by one not being in the order of the *grihí* (the householder or married man), or by a blind, impotent, or other person, disqualified from inheriting. The more correct opinion, however, appears to be, that an adoption by any of the persons described, would be valid, though it seems reasonable, that the affiliation of one excluded from inheritance, should confer no right of succession on the adopted, of which the adopter is debarred by law.—Sutherland's Synopsis, Head First.

324, 325. It has been doubted by Mr. Sutherland in his Synopsis, whether an unmarried person, that is one not a *grihí*, or as we would say, a bachelor, is competent to adopt; but he inclines to the affirmative of the question (p. 212). In the Precedents, Vol. II of this work,* in the case of adoption No. 1, the *pandits* expressly declared the adoption by such individual to be legal and valid, and there is certainly no authority against it. The same doubt is expressed, and the same conclusion arrived at, with respect

* *Vide* Precedents, page 504.

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Authority. It should not be argued that one who has no wife, being (consequently) excluded from the order of a householder, cannot properly adopt a son, this being an act mentioned when treating of the order of a housekeeper or married man. There is no argument (to support such an induction). Accordingly it is recorded in the *Bhárata* that VYÁSA and others, who had contracted no marriages, nevertheless obtained sons, namely, SHUKA-DEVA and others. He who happens to have no wife, (whether he had contracted no marriage, or his wife has died, or been forsaken by him,) either has not completed the ceremonies which perfect (twice born) men, or belongs to no order; but it is contrary to common sense that, although the form of adopting a son given has been observed, the adoption should be void.—*Coleb.* Dig., Vol. III, pp. 252, 253.

Vyavasthá. **325.** The impotent and the rest,* who, though incapable of inheriting, are capable of adopting.†

Vide Precedents, pages 455—459.

Annotations.

to an adoption by a blind, impotent, or lame person.—Macn. H. L., Vol. I., p. 66. Note.

323—325. "The expression '*a-putra*,'—destitute of male issue, occurring in the texts of MANU, cited as authorities for adoption, is explained as intending one whose son may have died, and one to whom no son may have been born. The first explanation obviously, and the second by implication, may be construed as solely referring to the *grihí* or married man. Again, the *Medhátithi* declares, that the scriptural precept enjoining the production of a son, must positively in some way be fulfilled by a person of the description noticed. There, however, do not appear sufficient grounds to pronounce the illegality of an adoption made, generally by a man who may not have married, or still less by one whose wife may have died. In fact, the passage in question of the *Medhátithi* may be regarded as merely enjoining the more obligatory necessity, for a married man, having no male issue, to adopt a son. JAGAN-NÁTHA,

* Here by the term "rest" are meant the outcast and his issue, a person born blind or deaf, one lame, a mad man, an idiot, one dumb, a person afflicted with leprosy or such other incurable disease. (See the Chapter on Exclusion from Inheritance.) Such of them, however, as are bereft of reason, are of course incapable of adopting.

† See the Annotations in the preceding page.

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As sons, blind, lame, and so forth, do not inherit, and since it is ordained, that their legitimate son and son of the wife only, participate in the estate of the paternal grandfather, a given or other description of son, adopted by such persons, have no right to the estate of the paternal grandfather, but to maintenance only. For alimony being provided for the wives of persons blind and so forth, maintenance of their adopted sons is inferred *à fortiori.—Dat. Ch.*, Sect. VI, para. 1. Authority.

Although in the above passage the right of the blind, lame, and other disqualified persons of adopting sons is (though indirectly) admitted, yet the right of such adopted sons to inherit from their paternal grandfathers is denied simply on the ground of their adoptive fathers being excluded from inheritance; but when the natural born sons of those persons inherit lineally, it is inconsistent with reason to deprive their adopted sons who (to all intents and purposes) represent their natural born sons. A "decision," says the sage VRIHASPATI, "should not be given by having recourse solely to the letter of the written codes, since, if no decision were made according to the reason of the law, there might be a failure of justice.* Authority.

Annotations.

in the *Vivāda-bhangārnava*, or the Digest translated by Mr. Colebrooke, expressly rejects as erroneous the doctrine, which would restrict adoption to a man in the order of *grihi*. * * * The individuals excluded from inheritance are, "the impotent person, the outcast and his issue, one lame, a mad man, an idiot, a blind man, a person afflicted with an incurable disease, and others similarly disqualified." The admissibility of a doubt, as to the legality of an adoption by such persons, is suggested with reference to a passage in the *Mitāksharā*, which declares, that, the specific mention of 'the legitimate son' and 'son of the wife' in a text of YÁJNAVALKYA, providing for the inheritance of such sons of disqualified persons, is intended to forbid the adoption, by them, of other sons. The author of the *Dattaka-chandrikā* likewise arguing from the same or a parallel text, that an adopted son is not ordained for disqualified persons, excludes such sons of those persons from succeeding to the estate of the paternal grandfather (Dat. Ch. Sect. vi.) In the absence, however, of other authorities, those alluded to can hardly be admitted as sufficient to establish a general rule vitiating *in toto* the adoption by one, excluded from inheritance. In fact,

* *Coleb.* Dig., Vol, II, p. 128.

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Authority. Although the eunuch and the rest* should not marry, they may adopt children; such as sons given and the rest.—*Coleb.* Dig., Vol. III, p. 321.

Authority. "But their sons, whether begotten in lawful wedlock, or procreated by a kinsman on the wife duly authorised, may take shares. provided they have no disability."* (YÁJNAVALKYA.)—On this text commentators remark, that two (descriptions of) sons of lepers and the rest, namely, one legally begotten, and one produced by a wife duly authorised, but no other sons, are capable of inheriting. This is not satis-

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Annotations.

the author of the *Dattaka-chandriká*, without advancing such a position, merely denies the right of one so adopted to inherit of his adoptive grandfather, and perhaps no more was intended by the author of the *Mitákshará*. Note IV, appended by Mr. Sutherland to his Synopsis, Head First.

Of the above remarks, only this much—'that an adopted son is not ordained for disqualified persons,'—does not seem to be accurate, as it differs from the doctrine of the *Dattaka-chandriká* alluded to by the learned writer himself, which is as follows: "As sons blind, lame, and so forth, do not inherit,—and since it is ordained that their legitimate son and son of the wife only participate in the estate of the paternal grandfather, a son given, or other description of sons, adopted by such persons, have no right to the estate of the paternal grandfather, but to maintenance only." (*Dat. Ch.*, Sect. vi, para. 1.) This can by no means be construed to mean that the author denied the adoption in the *Dattaka* and other forms of sons by blind men and the rest, as not ordained, but that recognising such adoptions by such persons, he denied their heritable right in their adoptive grandfathers' estates, and allowed them maintenance only.

Adoption by one, being himself, through any of the operative causes, incapable of inheriting, seems to be of a qualified nature, not entitling the adopted to the full rights of his condition.—Str. H. L., Vol. I, p. 77.

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* On this text, the author of the *Mitákshará* thus comments:—"The specific mention of legitimate issue and offspring of the wife, is intended to forbid the adoption of other sons." (See *Dat. Ch.* Sect. vi, Note 1.)—This exposition of the *Mitákshará* has been well refuted by the passage in the *Vivada-bhangárnava* already cited. More especially the adoption of the *dattaka* description of sons by impotent and the rest not being prohibited in the *Dattaka-chandriká*, must be taken not to have been prohibited, at least in the Bengal and Dravida schools.

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factory: for the issue of an appointed daughter, the son given, and the rest, are faultless; and the offspring of the wife, and the son legally begotten, are not specially mentioned in the texts of MANU and the rest. It should not be argued, that no ground of preference exists whether the text of MANU shall be restricted as bearing the same import with the text of YÁJNAVALKYA, or this shall be considered as exhibiting instances which elucidate the meaning of the other—"MANU holds the first rank among legislators, because he has expressed in his code the (whole) sense of the *Veda*; no code is approved which contradicts the sense of any law promulgated by MANU." (VRIHASPATI.)—*Vivádabhangárnava.*—See *Coleb.* Dig., Vol. III, pp. 322, 323.

326. A person afflicted with leprosy or such other sinful disease, or under any kind of pollution, is, however, required to perform penance previous to his or her adopting a son, though he or she is not required to do so, in giving a son unless he or she have to repeat the prescribed *mantras* of gift.* *Vyavasthá.*

Vide Precedents, pages 455—459, 494—499, 506.

Since he or she would not be capable of performing the religious rites necessary on the occasion, unless the impurity or disability caused by such sinful disease or pollution be removed by penance.† But in order to authorise his wife to adopt, a man is not indispensably required to perform the penance in question, inasmuch as the act of authorising one's own wife to adopt a son is equal to his begetting a son in her, and the law nowhere provides that a man afflicted with a sinful disease or under pollution must perform penance before his proceeding to do so. Reason.

327. The term "son" comprehending also the son's son and son's grandson (in the male line‡),—he who is destitute of these *capable* of performing the exequial rites and prolonging his lineage, can alone adopt a son, and not the person who has any of such issue in existence. *Vyavasthá.*

Vide Precedents, pages 442—454.

The word son here used is inclusive also of the son's son and grandson (in the male line), for (through these) the ex- Authority.

* See the forms of adoption.

† See the Chapter on Exclusion from Inheritance.

‡ See *ante*, page 269.

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clusion from heaven, denounced in such passages as "Heaven awaits not one destitute of a son," is removed: since it is declared in the text subjoined that the mansions of the happy are attained through the grandson and the other. "By a son, a man conquers the worlds: by a son's son he enjoys immortality: and afterwards by the son of a grandson (in the male line), he reaches the solar abode." Nor can it be alleged that the adoption of a son (though a grandson and his son exist,) is for the sake of the funeral obsequies; for from this text it appears that the other two also are competent to perform such rites. "The son of a son, and the son of a grandson, (in the male line,) like these, the offspring of a brother,"* &c., &c.—*Dat. Mím.*, Sect. I, § 13, 14.

Authority. As for the instance, appearing, of the adoption as sons of DEVARÁTA and the rest by VISHWÁMITRA, and others, although possessing male issue: that from its repugnancy to the revealed law, as contained in passages before quoted, must be understood not to imply the existence of a revelation (authorising the act).—*Ibid.*, § 10. Hence,—

Vyavasthá. **328. A man, though possessed of a son, grandson, or great-grandson (in the male line), *incapable* of performing exequial rites, or prolonging his lineage, has a right to adopt a son.**

Vide Precedents, page 507. Note.

Annotations.

327, 328. The *right* of adoption is in one destitute of legitimate male issue, *competent* to the performance of his funeral ceremonies; never having had any, or having lost what he had. The right of inheriting, and that of performing for the ancestor, his funeral obsequies being correlative, if, by any of the legal disabilities, as degradation from caste, by insanity, incurable disease, or otherwise, living issue have become disqualified in law for the former, the effect for the purpose in question being the same as if none existed, it is inferred that the right to adopt attaches.— Stra. H. L. Vol. I, (2nd Ed.,) page 77.

327, 328. The primary reason for the affiliation of a son, being the obligatory necessity of providing for the performance of the

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* The remainder of this text is: "Or that of a *sapinda* also, are born, Oh, king! capable of performing obsequies."—*Vishnu-purána.*—*Dat. Mím.*, Sect. II, § 60.

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Inasmuch as the object of having a son is the presentation of the oblations of food and libations of water, and the prolonging of one's lineage, and these cannot be expected from the issue as above. Reason.

329. The existence of a daughter's son and the rest is no bar to the adoption of a son, or no ground to invalidate such adoption, if made. *Vyavasthá.*

Vide Precedents, page 501.

Because, the word "son," used in the text "By a man destitute of a son," &c., (*ante*, p. 269,) comprehends only the son, son's son, and son's grandson (in the male line), but no one else. Consequently,— Reason.

Annotations.

exequial rites celebrated by a son for his deceased father, on which the salvation of a *Hindú* is supposed to depend, it is necessary that the person proceeding to adopt should be destitute of male issue capable of performing those rites. By the term issue, the son's son and grandson (in the male line) are included. It may be inferred that if such male issue, although existing, were disqualified by any legal impediment, (such as loss of caste,) from performing the rites in question, the affiliation of a son might legally take place.—Sutherland's Synopsis, Head First.

328. Mr. Sutherland, in his Synopsis (Head First), infers, and justly, that if male issue exist, who are disqualified by any legal impediment (such as loss of caste) from the performance of exequial rites, the affiliation of a son may legally take place.—Macn. H. L., Vol. I, page 67. Note.

In the Summary of Hindú Law, p. 48, it is laid down as a rule that insanity of a begotten son would not justify adoption by the parent, but to this and other general positions laid down in that work, I cannot altogether accede.—*Ibid.*, p. 67. Note.

329, 330. It is required that the party adopting should be destitute of a son, son's son, and son's grandson (SHOUNAKA cited in *Dat. Mím.*) It has been doubted by the author of the Considerations, (p. 150,) whether a man having a grandson by a daughter cannot adopt a son; but there is no solid foundation on which such a doubt can rest. It must have originated in the indiscriminate use of the word "grandson" in the English translations, as applicable to the daughter's son as well as to the son's son.—Macn. H. L., Vol. I, pp. 66, 67. Note.

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Vyavasthá. **330.** Notwithstanding the existence of a daughter's son, brother's son, or any other relative, a man destitute of a son, son's son, or son's grandson (in the male line) *capable* of performing the exequial rites and prolonging the lineage, is competent to adopt a son, and being himself unable to perform the act, can authorise his wife to do so. Whence,—

Vyavasthá. **331.** A wife duly authorised, and not otherwise, is competent to adopt a son for her husband either during his life or after his death.

Vide Precedents, pages 460—499, 504, 509. See the Appendix or Addenda.

Annotations.

330. It is natural for every man to expect an heir, so long as he has life and health ; and hence it is usual for persons, when attacked by illness, and not before, to give authority to their wives to adopt.—Macn. H. L., Vol. I, pp. 99, 100.

330, 331. It has been made a question of doubt, whether a widow, even with the sanction of her husband, is competent to adopt a son ; but her competency so to do is established by the prevailing authorities.—Stra. H. L., Vol. I, p. 66.

331. The better reason, therefore, perhaps, is, that the necessity of a son to celebrate the funeral rite regards the man, rather than the woman, who depends less for redemption upon such means ; so that, whenever a woman, duly authorised, adopts, it is on her husband's account, and for his sake, not her own.—Stra. H. L., Vol. I, page 79.

331. Adoption is the act of the husband ; though the wife may join in it. Her *consent* is not necessary. She, however, obtains spiritual benefit from the adoption ; and the adopted son becomes son of both, and he performs the funeral rites to both.—Norton's Leading Cases, Part I, page 62.

331. Hindú law does not allow any one but the widow to act vicariously for the man to whom the son is to be affiliated ; the widow is a delegate with express or implied authority, and cannot extend that authority to another person, so as to enable him to adopt a son, after her decease.—*Bhagwán Dás Tejmal* versus *Rájmal* alias *Hira-lál Lachiman Dás.*—Bom. H. C. Rep., Vol. X, Part i, page 241. See *Vyavasthá-chandrikā*, Vol. II, Part ii, pp. 140, 141.

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Women with the sanction of their husbands are competent to adopt, as*— Authority.

VASHISHTHA shows:—"Let not a woman either give or receive a son, unless with the assent of her husband."—*Dat. Ch.*, Sect. I, § 7.—*Dat. Mím.*, Sect. I, § 15. Authority.

"Let not a woman give or receive a son in adoption, unless with the assent of her husband." From this prohibitory ordinance (of VASHISHTHA) it appears that a woman under authority from her husband has also a right (to give or receive a son in adoption).—*Dattaka-siddhánta-manjarí.* See *Dattaka-shiromani,* (Sans.,) page 37. Authority.

Therefore there is no contradiction (in this) that even after the death of the husband, who gave permission to adopt (a son), his widow is competent to adopt a son given and the rest (*ádi*).—*Ví. Mi.*, (Sans.,) p. 189 (New Ed., p. 610). Authority.

The gift or acceptance (of a son) by a woman without the assent of her husband is invalid.—*Dattaka-nirnoya.* See *Dattaka-shiromani,* page 29. Authority.

Although the law can make a woman whose husband is alive act according to the direction given by him, yet a *widow* is not debarred from receiving a son in adoption.—*Dattaka-dídhiti.* See *Dattaka-shiromani,* page 35. Authority.

A woman's power under authority from (her) husband is indirect, because *there,* by the expression of the man's permission, his existence, from that time (to that of adoption), must be (assumed), in the same manner as the merit or demerit of an act subsists or continues up to its effect. It is the same in giving as in receiving.—*Dattaka-tilaka.* See *Dattaka-shiromani,* page 30. Authority.

Like men, substitutes for sons should be made also by women. Should it be alleged that, by (saying) "Let not a woman either give or accept a son," VASHISHTHA has shown that women have no right to give or receive sons, it is not so. Is women's want of right to give and receive sons (in adoption) based on the ground of their incompetency to recite the *mantras*† of acceptance, or on that of their having no authority from their husbands? Not the first, because a woman, having only made the *sankalpa*,‡ causes Authority.

* *Dat. Ch.*, Sect. I, § 7.

† *Mantra*, a text of the *Veda*, a mystical verse, or incantation, a form of prayer, a formula sacred to any particular deity.

‡ A resolution to perform a religious ceremony; a religious ceremony of consecration.

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burnt sacrifice (*homa*) and all other rites to be performed by the officiating priest (*áchárya*). Not also the second, because, by (saying) "unless with the assent of her husband," VASHISHTHA declares also women's right. He (VASHISHTHA) does not say that women have no right on account of their incompetency to recite the *mantras*. Does he then declare it for want of authority from their husbands? Again, has the husband's authority reference to the wife, or to the widow? In the first case, the wife, who is competent to adopt with recitation of the prescribed *mantras*, is commanded by her husband (thus)—"Do thou take a son" (in adoption); but where by accidence of human frailty a sonless husband does not adopt a substitute for a (natural born) son, but dies after saying to his wife, "Do thou adopt a son," (and, subsequently a son is adopted (by the wife, *then* a widow) for the presentation of the oblations of food and libations of water; such son is adopted in pursuance of the husband's command, and there being no inconsistency with what is already stated, it must be admitted that the adoption is made by the widow.—*Dattaka-darpana*. See *Dattaka-shiromani*, (Sans.,) page 31.

Remark. *Remark.*—NANDA PANDITA, however, says—"By a man destitute of a son."]* From the masculine gender being used, it follows that a woman is incompetent (to adopt). Accordingly VASHISHTHA ordains—"Let not a woman either give or receive a son in adoption, 'unless with the assent of her husband.' From this the incompetency of the widow is declared, since the assent of her lord is impossible." (1)—*Dat. Mím.*, Sect. I, § 15, 16.

Annotations.

(1) Equally loose is the reason alleged against adoption by a *widow*, since the assent of the husband may be given to take effect (like a will) after his death.—Stra. H. L., Vol. I, p. 79.

In regard to a widow's power of adopting a son, there is much diversity of opinions. VÁCHASPATI MISRA, who is followed by the *Mithilá* school, maintains that neither a woman, nor a *Shúdra*, can adopt a *Dattaka* or given son; because the prescribed ceremony includes a sacrifice, which they are incapable of performing. This difficulty may be obviated by admitting a substitute for the performance of that ceremony; and accordingly adoption by a woman, under an authority from her husband, is allowed by writers of the other schools of law. NANDA PANDITA, however, in the treatise on

* See *ante*, page 269.

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He, moreover, says,—"Now the connection to the father," is the filiation as his son; and such filiation proceeds from the sanction only of the father, not from the act of adoption; for the agent of that, in this instance, is the wife.—*Ibid.*, § 9.

The above impossibility, however, is justly solved or removed by the learned commentator, who says—"Since Reconciliation.

Annotations.

adoption, restricts this to the case of a woman whose husband is living, since a widow cannot, he observes, have her husband's sanction to the acceptance of a son. On the other hand, BÁLAM-BHATTA contends that, a woman's right of adopting, as well as of giving a son is common to the widow and to the wife. This likewise is the opinion of the author of the *Vyavahára-mayúkha;* but, while he admits that a widow may adopt a son without her husband's previous authority, he requires that she should have the express sanction from his kindred. Writers of the *Goura* (Bengal) school, on the contrary, insist upon a formal permission from the husband declared in his lifetime.—Note by Mr. Colebrooke to his translation of the *Mitákshará*, Chap. I, Sect. xi, § 9.

"It may be added," says Mr. Sutherland, "that the author of the *Vira-mitrodaya* concurs in the opinion of the *Vyavahára-mayúkha* just noticed. Of these works, the former is more particularly current at Benares, and the latter among the *Marhattas*.—Note vi, appended by Mr. Sutherland to his Synopsis, Head First.

"The same reason, which imposes the necessity of adoption on a man, not equally applying to a woman, the latter, (at least such seems the more accurate and prevailing doctrine,) is incapable in her own right of adoption, though it is admitted that by his sanction she may affiliate on the part of her husband a son who would necessarily be filially related to herself. NANDA PANDITA denies generally the authority of a widow to adopt, assigning a reason, by no means satisfactory, that the assent of her husband is impossible: but it is reasonable to admit, consistently with practice and the opinion of other authors, the validity of an adoption made by a widow under the sanction of her husband, written or formally expressed during his lifetime, and, perhaps, in some places under that of kinsmen.—Sutherland's Synopsis, Head First.

It is an universal rule in Bengal and Benares that a woman can neither adopt a son nor give away her son in adoption, without the sanction of her husband previously obtained."—Macn. H. L., Vol. I, p. 100.

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the assent of her lord is impossible."] "By this it must be understood that the widow, who was authorised by her (late) husband in his lifetime, has certainly a right (to adopt a son).—Commentary on the *Dattaka-mímánsá*, (Sans.,) page 7.

Remark. The above exposition is not only consistent with reason and practice, but also consonant with the high authorities already cited, more especially with the *Dattaka-chandriká*, the preferable authority on the Bengal school.

Vyavasthá. **332.** A man having adopted a boy is incompetent to adopt another son either personally or through the agency of his authorised wife, during the existence of the boy already adopted, unless this boy be legally disqualified to perform the duties of a son.*

Vide Precedents, pages 442—454, 475, 476, 479, 482, 483, 507. Note, 508.

Annotations.

332. Sir Thomas Strange, however, says: "As there exists nothing to prevent two successive adoptions, the first having failed, whether effected by a man himself, or by his widow or widows after his death, duly authorised, so, even where the first subsists, a second may take place, such having been the pleasure and will of the husband; upon the principle of 'many sons being desirable, that some one of them may travel to *Gayá*;'—a pilgrimage considered to be particularly efficacious, in forwarding departed spirits beyond their destined place of torture."—Stra. H. L., Vol. I, p. 78.

The latter part of this observation, namely,—"so, even where the first subsists, a second may take place, such having been the pleasure and will of the husband,"—appears to be objectionable. In the first place, one adopted son being sufficient for the purpose, there is no necessity for adopting another substitute for the legitimately begotten son; secondly, the law has nowhere provided that during the existence of one son another may be adopted, on the contrary, it has emphatically laid down that only that man who is destitute of male issue can adopt a son; thirdly, as soon as a man adopts a son, he is father of male issue, and a man having male issue (in the male line) is expressly prohibited by the law to adopt another.

* See the Annotations, pp. 290, 291, and Precedents, p. 507. Note.

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Because the object of having a son being attained by the one already adopted, it is unnecessary to adopt another, and the circumstance of the adopter being destitute of a son is the only criterion in the matter of adoption. Reason.

ATRI:—By a man destitute of a son only (*a*) must the substitute for a son always be adopted, with some one resource, for the sake of funeral cake, water and solemn rites."—*Dat. Mím.*, Sect. I, § 3. Authority.

(*a*) By a man destitute of a son only.] The incompetency of one having male issue is signified by the term only in this passage.—*Dat. Mím.*, Sect. I, § 6. Explanation.

Annotations.

332. As to the principle of "many sons being desirable that some one of them may travel to *Gayá*," upon which such inference is drawn, it applies to sons begotten and not adopted.—See the case of Gouree-prosaud Roy *versus* Joymala (S. D. A. Rep., Vol. I, p. 136,) alluded to by the learned compiler himself. Then as to the pleasure and will of the husband, the exercise of such pleasure or will of his seems to have been completely restrained by law; had it not been so, he, while having a son, would have been competent to adopt another.

The observation of Sir William Macnaghten on the subject in question is, therefore, a correct one. It is as follows:—"It is clear that a man having adopted a boy and that boy being alive, he cannot adopt another. It is written in the *Dattaka-mímánsá*: "A man destitute of a son (*aputra*) is one to whom no son has been born, or one whose son has died; for a text of SHOUNAKA expresses 'One to whom no son has been born, or one whose son has died, having fasted for a son, &c." "There is a *vyavasthá* maintaining the opposite doctrine, the authority cited for which is a verse ascribed to MANU, though not to be found in his institutes:—'Many sons are to be desired, that some one of them may travel to *Gayá*,'—but this text obviously relates to legitimate sons." See the case of Gouree-prosaud Roy *versus* Joymala, p. 136, Vol. I, Sudder Dewany Adawlut Reports.—Macn. H. L., Vol. I, pp. 80—83.

RAGHU-NANDANA, however, has cited the above text as being of the *Matsya-purána*, and applicable to legitimate sons of the body. Again JAGAN-NÁTHA has cited the same text, as contained in SRÍ-DHARA-SWÁMÍ'S commentary on the *Bhágavata*, without mentioning

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Vyavasthá. **333.** But although a man, having a legitimate son of the body, or one adopted, or a son's son, or son's grandson (in the male line), alive and competent to fulfil the object of having a son, cannot adopt another son, yet he can adopt, or leave permission to his wife to adopt a son, in case the male issue then existing or about to be born die without leaving a son, free from any of the legal defects.

Vide Precedents, pages 442, 443, 448, 460, 471, 475, 476, 478, 479, 507.

Annotations.

whose text it is. And the interpretation thereof given by JAGAN-NÁTHA is, that sons of various descriptions may be adopted by one who desires numerous offspring. (See *Coleb.* Dig., Vol. III, p. 295.) Thus the authenticity of the text in question is uncertain, and even according to JAGAN-NÁTHA'S interpretation it does not apply to many sons of the description of *Dattaka*, which is the only form of adoption used in the present *(kali)* age, but to sons of the various descriptions (already mentioned). Hence, according to this text also, many *Dattaka* sons cannot be received in adoption.

Mr. Colebrooke (in a note to S. D. A. Rep., Vol. I, p. 42) observes, 'that the validity of a second adoption, while another son, whether by birth or adoption, is living, is a question on which writers of eminence have disagreed; that JAGAN-NÁTHA, in his Digest, inclines to hold it valid; but that the author of the *Dattaka-Mímánsá*, a work of great authority, maintains the contrary opinion.' To this it is to be added by way of conclusion that, as no writers of such eminence as those of the *Dattaka-mímánsá* or *Dattaka-chandriká* have affirmed the validity of such adoption, (nay, on the contrary, they have maintained the invalidity thereof,) the opinion of JAGAN-NÁTHA or any other modern compiler cannot override the doctrine laid down in the *Dattaka-mímánsá*, one of the two highest authorities on the subject of adoption, more especially when its doctrine is in exact conformity with the text of the holy legislators—MANU and the rest, and the opinion of JAGAN-NÁTHA is quite contrary to them.

333. It seems to be admitted, that a man having a legitimate son may not only authorise his wife to adopt a son, after his death, failing such legitimate son, but also, failing the son adopted, to adopt another in his stead.—Macn. H. L., Vol. I, pp. 83, 84.

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334. A woman even under her husband's authority cannot adopt a son, on the ground of having no son of her own, while there existed a son of her husband, adopted or born of another wife of his; nor on the death of the then existing adopted son, can a woman adopt another without her husband's permission expressed or implied. *Vyavasthá.*

Vide Precedents, pages 478, 479, 483, 489, 502, 504, 507, 508.

Inasmuch as a son adopted by her husband or born of her rival wife is filially related to her also and the husband had no power to give authority to adopt a son in the above case in which he himself could not adopt one. Reason.

If, among all the wives of the same husband, one bring forth a male child, MANU has declared them all, by means of that son, to be mothers of male issue.—MANU, Chap IX, *verse* 183. Authority.

Annotations.

334. The right of adoption, where it exists, is, as between husband and wife, absolute in the husband, though adoption having taken place, the adopted becomes the son of both, and as such, is capable of performing funeral rites to the one as well as to the other.—Stra. H. L., Vol. I, pp. 78, 79.

334. "It is a disputed point," says Sir William Macnaghten, "whether a widow having, with the sanction of her husband, adopted one son, and such son dying, she is at liberty to adopt another without having received a conditional permission to that effect from her husband. According to the *Dattaka-Mímánsá*, the act would be clearly illegal; but JAGAN-NÁTHA holds that the second adoption in such case would be valid, the object of the first having been defeated." Although this doctrine of JAGAN-NÁTHA is not repugnant to the texts of the legislators, but is rather agreeable to the true intention of their laws, yet it ought to be received in its qualified sense, and accordingly acted upon, namely, if the husband's permission was expressly to adopt *only one* son, and no more, even in the event of that adopted son's dying without a son, then, notwithstanding the object of adoption would be defeated by his premature death, the widow could not adopt another, for the husband's permission is, above all, essential to the adoption by a widow, and it was his duty not to give such per-

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Authority. The son of a rival wife, originating immediately from portions of the husband, bears, though unadopted, the relation of son to another wife.—See *Dat. Mím.*, Sect. II, para 70.

Authority. In consequence of the superiority of the husband, by his mere act of adoption, the filiation of the adopted, as son of

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Annotations.

mission without providing for such contingency ; so if, instead of so doing, he gave such restrictive permission, then he is in fault if the object of adoption be thus defeated. But if the husband's permission was a general one, namely, to adopt and have a son for perpetuating the lineage, without mention whether or not she could adopt another, in the event of the adopted son's dying without a son, then she seems to be warranted to adopt another in his stead, the meaning of her husbund's permission in such case being that the object of having a begotten son must be fulfilled by the substitute for such son ; so, one adopted son failing by death to fulfil that object, it is certainly implied that another substitute should be taken, in order that the obsequies of the husband and his forefathers may not cease, and the celestial bliss be forfeited. In truth, when such adoption is not prohibited in the *Dattaka-chandrikā*, and is sanctioned by the modern authority aforesaid, it may be held to be allowable in Bengal under the circumstances stated.

As the husband's kindred may authorise the widow to make an adoption, (see note to *Mitāksharā* on Inh., Chap. I, Sect. xi, § 9,) wherever the authority of *Vijnāneshwara*, and *Mayúkha*, and works of the same school, are followed, her son's sanction would no doubt be sufficient. It is otherwise in Bengal, where no sanction but the husband's can avail.—Colebrooke's Remarks.—Stra. H. L., Vol. II, p. 72.

"According to the authorities which are followed in Bengal and Benares, a woman is competent, after the death of her husband, to adopt a son, provided he gave her permission to do so during his lifetime. It is a universal rule in Bengal and Benares that a woman can neither adopt a son, nor give away her son in adoption, without the sanction of her husband previously obtained."—(Macn. H. L., Vol. I, pp. 90, 100.) The latter part of this rule, namely, "Nor give away her son, without the sanction of her husband previously obtained," though it be a general rule, is not the law of Bengal, the *Dattaka-chandriká* having laid down a different one.—See *Dat. Ch.*, Sect. I, § 31.

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the wife, is complete, in the same manner as her property in any other thing accepted by the husband.—*Dat. Mím.*, Sect. I, § 22.

The filiation of a son, by a woman proceeding legally, with the sanction of her husband, to constitute for him male issue, only takes place where no son of that person may exist. But if he have any, although she may be destitute of the same, such adoption does not obtain; for to proceed therein would be unproductive of the object.—*Dat. Ch.*, Sect. I, para. 24. Authority.

In that case, she would not be exempted from exclusion from heaven. In anticipation of this objection, the two texts of MANU and VRIHASPATI, by propounding the existence of filial relation in the son of a rival wife, (to his stepmother,) provide for her exemption from exclusion from heaven and the performance of her funeral obsequies; for, except the offspring of her husband, she can have no other. Since (a wife) can have no offspring but the issue of her husband; the son in question even preserves her lineage. Therefore, where the son of a rival wife exists, as the whole benefit even of a son is attained, no affiliation, (by the stepmother, of him or another,) as a son given, and so forth, takes place.—*Dat. Ch.*, Sect. I, § 25, 26. Further,— Authority.

335. A woman cannot adopt a son by putting a forced construction on the permission, as well as under an illegal authority, of her husband. *Vyávasthá.*

Vide Precedents, pages 478, 479, 483, 487, 488, 508.

Inasmuch as the adoption of a son would be invalid if made under a permission which the husband had no power to grant, or which was modified according to the exigency of the case, or construed otherwise than what was intended by him. Reason.

With regard to double or simultaneous adoptions,—

BHAVA-DEVA BHATTA says:—"One cannot regulate according to his independent will." By this maxim, if many sons even are adopted by one will and by one (*i. e.*, simulta- Double or simultaneous adoptions.

Annotations.

333—335. It has also been ruled that authority to a wife to adopt, in the event of a disagreement between her and a son of her husband then living, will not avail, though authority in the event of that son's death would be valid.—Macn. H. L., Vol. I, pp. 84—86.

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neous) performance of religious ceremonies, they are certainly valid; but not those adopted with ceremonies performed at different times, though the will (of adopting them) be one; and not even if the same be done under permission. Consequently, as sons simultaneously adopted at an earnest desire by the performance of the (prescribed) religious ceremonies are valid, so while there exists one (adopted son) free from defect, no other (is valid). If out of regard to one's wives even many sons are adopted by one will, and by the simultaneous performance of the religious ceremonies, they are good in law.—*Dattaka-tilaka* by BHAVA-DEVA BHATTA.

Vyavasthá. **336.** A man, not being competent to delegate to others a greater power than what he himself possesses, cannot authorise his wife to adopt more than one son at a time, or his several wives each to adopt a son; nor can the wife or wives make such adoptions under such power. Of the adoptions, if so made, the first only is valid.

Vide Precedents, pages 478, 479, 483.

Reason. Inasmuch as the man being the father of a son immediately after the completion of the first adoption, and his being destitute of a son being the only criterion in the matter of adoption, the law does not allow the adoption of another son while the first is alive and free from any defect, as in that case he is no longer destitute of a son. The doctrine laid down in the following passages is, therefore, correct as well as prevalent.

Annotations.

336. It is clear that a man having adopted a boy, and that boy being alive, he cannot adopt another.—Macn. H. L. Vol. I, p. 80.

In the case of Gouree-prosaud *versus* Joymala (S, D. A. R. Vol. I, page 136,) it appears that the husband, after adopting a son in conjunction with one of his wives, had confirmed his permission already given to another wife to adopt: and the adoption made under such permission during the existence of the son already adopted was declared valid by the Sudder Court, though such adoption was by no means valid according to the Hindú law. The decision declaring the validity of the above was, however, rejected as wrong by the Privy Council in decisions already printed.—See *ante*, pages 442, 443.

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It is not proper that a man who has one substitute for the legitimate son of the body, should make another substitute for the (same) son.—*Dattaka-siddhánta-manjari.* See *Dattaka-shiromani.* Authority.

By a man destitute of a son *only.**] The incompetency of one having male issue is signified by the term 'only' in this passage.—*Dat. Mím.* Sec. I, § 6. Authority.

He who has no son, or son's son, or son's son's son, or brother's son, shall adopt a son; and while he has one adopted son, he shall not adopt a second.—*Vivádárnavasetu.* Authority.

337. A woman who is authorised by her husband to adopt a son, may adopt at any time when a boy fit to be adopted is procurable, provided she be then in a state of competence to perform the act. *Vyavasthá.*

Because there is no period fixed by law within which a wife or widow must adopt a son. Reason.

See the Precedents at pages 113, 94—99, and also the qualified doctrine laid down in the Precedents at pages 75—79.

338. But if a wife authorised to adopt do not adopt a son, notwithstanding a boy fit to be adopted were to be had, then she becomes guilty of discontinuing the oblations of food and libations of water, and extinguishing the lineage, though not excluded from inheritance. *Vyavasthá.*

Vide Precedents, pages 489, 508, 509.

339. A wife or widow, even when an infant, may adopt a son under authority from her husband. *Vyavasthá.*

Vide Precedents, page 505.

As in so doing she only executes her husband's order, the husband being in effect the doer of the act in question. Reason.

340. It has also been determined that a boy, who has attained the age of discretion, though not considered, in the eye of the law, as having attained majority, is competent to adopt a son. *Vyavasthá.*

Vide Precedents, pages 490—492.

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* See *ante*, page 269.

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Remarks. The above determination is quite consistent with the reason of the law, as well as with the law itself. Because, from the subjoined text of the *Veda* :—"A *Bráhmana*, immediately on being born, is pronounced a debtor on three obligations;—to the holy saints, for the practice of religious duties; to the gods, for the performance of sacrifices; to his forefathers for offspring;" also from the following text of MANU: "When he has paid his three debts, (to the sages, the manes, and the gods,) let him apply his mind to final beatitude; but low shall he fall, who presumes to seek beatitude, without having discharged those debts;" also from the subjoined text of the same sage cited in the *Dattaka-chandriká*: "A son of any description must be anxiously adopted by a man destitute of male issue; for the sake of the funeral cake, water, and solemn rites, and for the celebrity of his name;" and also from the following passage of the *Dattaka-mímánsá*: "Since it is shown by this, that being so destitute is a cause, in omitting to adopt a son, an offence even is incurred;"—it is evident that the adopting of a son is a positive religious act; and from this special dictum of the latter authority, that "the precept enjoining the production of a son being positive, it results that the contravention of it is the cause of an offence; and on defect of any son in general, exclusion from heaven is declared in this text: 'heaven awaits not one destitute of a son,' &c., it is also evident that adoption according to that authority is certainly a positive religious act (*nitya dharma-karma*), and not an optional (*kámya*) one, since any religious act, the non-observance or non-performance whereof causes an offence is termed '*nitya karma*' (positive act.) But though adoption be a positive act of religion, and, as such, it be incumbent upon persons destitute of sons to adopt, yet, consistently with the reason of the law, an infant *without discretion* is incompetent to adopt a son; for how can *that* boy do so who does not understand why a son is to be adopted, and what the consequence is of not adopting a son? In the *Práyaschitta-kánda* distinction is made with regard to severity in the penance or expiation of infants, according to their ages and understanding. In the *Vyavahára-kánda* too an infant (*shishu*), before his eighth year, is considered as being similar to a child in the womb, and to the tenth year a (mere) child, and, as such, is destitute of discretion. Consequently, it is inconsistent with the reason of the law that an infant up to that age should adopt a son (though adoption be a positive act of religion.) From the eleventh to the fifteenth or sixteenth year of his age an infant is termed an adolescent (*kishora*): at this age, his faculties develope, and he has discretion. It may, therefore,

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be concluded that a boy, who has attained the age of discretion, and is not bereft of reason, but conscious of the benefit and religious merit to be gained by the adoption of a son, may adopt a son, or may cause a son to be adopted for him, provided he be sure not to have a natural born son. Moreover, when a minor of this age is competent to appoint a substitute (*prati-nidhi*) for the performance of the *shráddhas* of his ancestors, he should also be competent to appoint a perpetual substitute for the performance of his own *shráddhas* and of those of his ancestors.

Now it remains to be seen whether the son adopted by a minor, as aforesaid, would be entitled to inherit from him though he could not be appointed by him to be successor to his estate; because, although a minor of discretion is competent to adopt a son which is a religious act, yet he is incompetent to appoint a successor to his estate which is a Civil Act, and which a minor is prohibited to do.* But it is to be known that the adoption of a son for spiritual purposes is the essential part of the act, and devolution of property is a mere legal consequence which must follow the adoption.(1) In other words, the right of succession to the adopter's property being concomitant with the performance of his exequial rites by the adopted son must vest in him by reason of his being vested with the right of performing those rites. Remark.

341. A verbal authority to adopt is as valid as a written one; the latter therefore is not indispensably necessary. *Vyavasthá.*

Vide Precedents, pages 500, 501, 502, 510.

Annotations.

(1) The validity of an adoption is to be determined by spiritual rather than by temporal considerations; that the substitution of a son of the deceased for spiritual reasons is the essence of the thing; the consequent devolution of property is a mere accessary to it.—Part of a Privy Council Decision. See *V. Ch.*, Vol. II, Part ii, p. 51.

It may be the duty of a court of justice administering the Hindú law to consider the religious duty of adopting a son as the essential foundation of the law of adoption, and the effect of an adoption upon the devolution of property as a mere legal consequence.—*Ibid.*, p. 52.

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* See the Chapter on Minority.

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Vyavasthá. **342.** A writing is not also indispensably necessary for giving a son in adoption.

Vide Precedents, pages 500, 501, 502, 510.

Reason. There being no difference in law between the two, and either of them, when satisfactorily proved, being sufficient for the purpose.

SECTION III.

WHO IS OR IS NOT COMPETENT TO GIVE A SON IN ADOPTION.

Vyavasthá. **343.** The father of several sons of his own authority, and the mother with the assent of her husband, or both of them conjointly, are competent to give a son in adoption to a person, who is of the same class or caste, destitute of a son, son's son, and son's grandson in the male line, and not a prohibited relation.*

Vide Precedents pages 523, 531, 532, 547.

Annotations.

341. The authority to the widow need not be in writing; though it generally is so; as in prudence it ought to be, time and means existing. In the case of the zemindar of Rajshahye, it was in writing;—in another case,† a verbal one for the purpose was held good by the Sudder Dewany Adawlut of Bengal.—Stra. H. L., Vol. I, pp. 80, 81.

341, 342. A written authority is doubtless not indispensable.—Colebrooke's opinion. See Stra. H. L., Vol. II, p. 96.

Adoption is not required to be in writing, any more than an authority to the widow to adopt. But in a transaction so important as one transferring a young person from the family in which he was born to a new one, and with a view to succession, interposing, by substitution, a comparative stranger, between the adopter and his existing heirs, it were best to be in writing, and, at all events, the law, for the sake of certainty, encourages, if it does not stipulate for whatever is calculated to render it public and solemn. —Stra. H. L., Vol. I, p. 93.

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* See the section next following. See Macn. H. L., Vol. I, pp. 66, 67.

† *Sham Chunder* v. *Narayni Debi.* Sel. S. D. A. R., Vol. I, p. 135.

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"By a man having several sons."* Since the masculine gender is here used, the gift of a son, by a woman, is prohibited. Accordingly VASHISHTHA says:—"Let not a woman either give or accept a son;"—and [her] independency is not ordained. With the husband's assent a woman also is competent. Accordingly, VASHISHTHA adds—"unless with the assent of her husband."—"Whom his mother, or his father, gives (*dadyát*);" "his mother and father give (*dadyátam*)." As for what is contained in these passages, as intimating the equality of the father and mother, that is merely with reference to the assent of the husband.—*Dat. Mím.*, Sect. IV, § 9—11. Authority.

The husband, singly even and independent of his wife, is competent to give a son: for in the two passages cited (in para. 11) the father is mentioned singly, and unassociated with the mother; and there is this reason of BOUDHÁYANA found: "From the predominance of the virile seed, sons are regarded even as not produced of the womb." In the *Bhárata* also, [a reason is found:] "The mother is the fosterer: the son is of the father: he is (as it were) that very person, by whom produced." A passage of revealed law is likewise (confirmatory): "Himself is truly born a son."—*Ibid.*, § 13. Authority.

MANU:—He is called a son given, whom his father or mother, affectionately give as a son, being alike (*a*), and in a time of distress (*b*), conferring the gift with water.—*Dat. Ch.*, Sect. I, § 12. Authority.

Conformably, in this passage, ("the mother or father gives,") MANU, intending,—from her dependance on the assent of her husband, the inferiority of the mother (as the agent in the gift of a son);—the mediocrity of the husband, on account of his independence of the wife; and the pre-eminence of both united, from their being equally parents,—propounds each position (in order last). It must not be argued that this is merely a single sentence, on account of the only verb being used in the dual number: for, the disjunction in the middle (by the particle 'or'), would be inconsistent. Therefore the passage in question comprises three positions. Accordingly the chief of the saints, in this passage, "whom his mother, or his father gives," has used the verb in the singular number, even though referring to each (nominative case).—*Dat. Mím.*, Sect. IV, § 15—17. Authority.

The mention of gift, by the joint act of the father and mother, is intended to show the means of effecting a donation productive of no immoral consequence; but the gift made by the man alone is valid.—*Coleb.* Dig., Vol. III, page 244.

* Part of SHOUNAKA's text. See the following page.

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Explanation. *(a)* '*Alike.*'] Belonging to the same class.—In fact, the construction of the word 'alike' *(sadrisha)*, in MANU's text, as signifying of the same class, is only proper;* for, elsewhere, the participating, as an heir, of such adopted son, is shown: and the participating in the inheritance of one unequal in class is impossible. Thus SHOUNAKA declares: "If one of a different class should, however, in any case, have been adopted as a son, he should not make him the participator of a share: this is the doctrine of SHOUNAKA."—YÁKSHA explicitly declares this: "A person of the same class must be adopted as a son. Such a son performs the oblations, and takes the estate; in default of him, one different in class, who is regarded merely as prolonging the line. He receives food and raiment only from the person succeeding to the estate."—*Dat. Ch.*, Sect. I, § 13, 15, 16.

Authority. Accordingly *Vriddha* GOUTAMA forbids the participation, in inheritance, of one not of the same tribe, thus—"Or should one of a different class be taken as a son, in any instance, let him (the adopter) not make him a participator of a share: this is the doctrine of SHOUNAKA."—*Dat. Mím.*, Sect. II, § 21.

Conclusion. Hence it is established that one of a different class cannot be adopted as a son.—*Ibid.*, § 22.

(*b*) '*In a time of distress.*'] The adopter being destitute of male issue.†—*Dat. Ch.*, Sect. I, § 13.

Authority. "By no man, having an only son (*eka-puttra*), is the gift of a son to be ever made. By a man having several sons (*bahu-puttra*) such gift is to be made on account of difficulty (*pra-yatnatas*)."—SHOUNAKA. He, who has one son only, is '*eka-puttra*,' or one having an only son: by such a one the gift of that son must not be made: for a text of

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* In the present (*kali*) age, the marriage with a damsel of a different class having been prohibited, and consequently the production of a son in the womb of such a wife, the adoption of a son of a different class, not to mention his disinherison, if ever adopted, must, *á fortiori*, be concluded to have been prohibited: such adoption is moreover contrary to custom, which itself is transcendent law, and supersedes the general maxims of the law.—See *ante*, pages 173, 174.

† The author of the *Dattaka-mímánsá* explains the phrase "in a time of distress," as signifying also in a famine, and so forth, thus: "*During distress.*'] In a famine, and so forth: should the gift be made, no distress existing, the giver commits a sin, on account of the prohibition, 'otherwise he must not attempt the same.' Or the term '*prayatnatas*' may signify—'on account of difficulty of the adopter.' '*During distress*;' that is, when destitute of male issue: on account of the text of ATRI, commencing—'By a man destitute of a son only must a substitute for the same always be adopted, &c.;' and it is thus interpreted, even by APARÁRKA, and in the *Chandriká*—'*During distress*,' that is, the adopter having no son." (*Dat. Mím.*, Sect. IV, § 20, 21.) The interpretation of the *Dattaka-chandriká* is alone accepted and used in Bengal.

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VASHISHTHA declares: "An only son, let no man give, &c." Since the word 'gift' means the establishing another's property, after the previous extinction of one's own; and another's property cannot be established without his acceptance; the author (SHOUNAKA), implies this also in his text in question. Therefore, a prohibition likewise against acceptance is established by that very text. Accordingly VASHISHTHA: "An only son, let no man give, or accept, &c." To this he subjoins a reason—"For, he is [destined] to continue the line of his ancestors." His being intended for lineage, being thus ordained; in the gift of an only son the offence of extinction of lineage is implied. Now this is incurred by both the giver and adopter also. For the reason in question is subjoined, after both [verbs: *viz.*, give and accept].—*Dat. Mím.*, Sect. IV, § 1—4. So,—

344. An only son must not be given nor accepted in adoption.* *Vyavasthá.*

Vide Precedents, pages 522, 531, 532, 547.

For VASHISHTHA ordains:—"Let no man give or accept an only son."(1)—Chap. XV, *v.* 3. Authority.

345. Nor, though a numerous progeny exist, should an eldest son be given.† *Vyavasthá.*

Annotations.

344. *So an only son should not be given.*] Nor should such a son be accepted. The blame attaches both to the giver, and to the taker, if they do so.—BÁLAM-BHATTA. Colebrooke's Annotation to *Mit.*, Chap. I, Sect. xi, § 11.

(1) *Let no man give on accept an only son.*] "For he is (destined) to continue the line of his ancestors." such is the sequel of VASHISHTHA's text.—BÁLAM-BHATTA.—*Ibid.*

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* VASHISHTHA, *Dat. Nir.*, and MANU, *Ibid.*; but this is an injunction rather against the giving than receiving an only or elder son in adoption, and the transfer having been once made, it cannot be annulled. This seems but reasonable, considering that the adoption having once been made, the boy, *ipso facto* loses all claim to the property of his natural family. See Bombay Reports, case of *Huebut Rao* v. *Gobind Rao*, Vol. II, page 75.—Macn H. L., Vol. I, p. 67, Note. But the doctrine of '*factum valet*,' as adopted in this and in the following passage, does not prevail in adoption.—*Vide* Precedents, pages, 534—547, and *V. Ch.*, Vol. II, Part ii, p. 129.

Let no man accept (an only son), because he should not do that whereby the family (of the natural father) becomes extinct: but this does not invalidate the adoption of such a son (actually) given (to him).—*Coleb. Dig.*, Vol III, p. 244

† It has, however, been held by the dispensers of justice that the adoption as well as the gift of an eldest son is valid.—See Precedents, pp. 524 and 552.

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Reason. For he chiefly fulfils the office of a son; as is shown by the following text:—

Authority. MANU:—By the eldest son, as soon as born, a man becomes the father of male issue.—Chap. IX, *v.* 106. See *Dattaka-shiromani*, pp. 37, 77; see also the following section.

Next, the author (SHOUNAKA) replies to the question,—By whom is a son to be given? "By one having several sons. He who has several sons is '*bahu-puttra*,' or 'one having several sons.' "By no man having an only son." From this prohibition, the gift, by one having two sons, being inferable; this part of the text ("By one having several sons," &c.), is subjoined to prohibit the same, by one having two sons also. For, the speech of SHÁNTANU to BHISHMA expresses: "He who has only one son is considered by me as one destitute of male issue. Oh! descendant of KURU, One who has only one eye is as one destitute of both: should his only eye be lost, he is absolutely blind."—*Ibid.*, § 7, 8.

Authority. The author (SHOUNAKA) apprehending an extinction of lineage, in case of the gift of a son, by one, even having two sons, says: "By one having several sons such gift is to be anxiously made."—*Dat. Ch.*, Sect. i, § 29, 30. But—

Vyavasthá. **346.** Though prohibited by the legislators and digest-writers, the gift of a son by one having two sons is seen in practice, and it is not declared invalid by the courts of justice.

Annotations.

346. It has already been observed that a man who has a son, son's son, or son's grandson, is not competent to adopt a son: and it would seem to follow by analogy that if a man has a son, and the son of an elder son deceased, he may give the former away in adoption, because he cannot be considered as the father of one son only; the latter also bearing towards him the relation of a son to all intents and purposes, and supplying the place of the elder one. In the *Dattaka-mímánsá*, there is a prohibition against the gift of a son, where there are only two, but the precept is merely dissuasive, and not peremptory.—Macn. H. L., Vol. I, p. 77.

In this case the dissuasive precept against giving one of two sons, would apply, but the adoption would nevertheless be valid.—*Ibid.*, Note.

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347. A woman is competent to make a valid gift of a son without her husband's assent, after his death, natural or civil, and if he has emigrated (*proshite*).* *Vyavasthá.*

Vide Precedents, pages 502, 503.

But by a woman the gift may be made, with her husband's sanction (*c*), if he be alive; or even without it, if he be dead, have emigrated (*proshite*),* or entered a religious order.—*Dat. Ch.*, Sect. I, § 31. Authority.

(*c*) If there be no prohibition even, there is assent on account of the maxim: "The intention of another, not prohibited, is sanctioned."—*Ibid.*, § 32. Explanaton.

Sir William Macnaghten says:—"Regarding this branch of the law, there is not much difference in the doctrine of the several schools; the *Dattaka-chandriká* and *Dattaka-mímánsá*, the two chief authorities on the subject, being Remark.

Annotations.

In strictness, to enable a man to give a son to be adopted, it is not sufficient that he have more than one; he should have several; since if having only two, he part with one, the death of the remaining one, leaving him destitute, would be a contingency not to be risked. It does not, however, appear, that this ever prevailed as a rule. If therefore he have two, he may relinquish the younger.—Stra. H. L., Vol. I, p. 73.

343, 347. On the subject of the legal ability, to give a son in adoption, some difficulty exists, in extracting a consistent doctrine. The more correct opinion appears to be—1st, that the father may give away his minor son without the assent of the mother, though it is more laudable that he should consult her wishes; 2nd, that the mother generally is incapable of such gift while the father lives; 3rd, that she, however, on her husband's death, may give in adoption her minor son, and even during the life of that person, in case of urgent distress or necessity. A man who have permanently emigrated, entered a religious order, or become an outcast, being civilly dead, would be regarded as virtually deceased.—Sutherland's Synopsis, Head Second.

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* The above doctrine not being contradicted in the *Dattaka-mímánsá* and other treatises on adoption, may be taken to be universal.

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respected by all. The first text above cited being sufficiently explicit as to the persons who possess the right of giving in adoption, and the only exception that has been propounded by the commentators, is contained in the *Dattaka-mímánsá*, which refers to the gift of her son by a widow during a season of calamity." (Macn. H. L., Vol. I, p. 66.)

But the learned writer does not point out the particular passage of the *Dattaka-mímánsá* which deals with the above. The only passages that legalize gift or sale of a son in a time of calamity are the above quoted, but they authorize not a widow exclusively, but also a father, *or* a mother, whether she be a widow or wife, to do so.

348. Save and except the father and mother, no person can give a boy in adoption.

Vide Precedents, pages 510, 513, 547, 548.

SECTION IV.

WHO MAY, OR MUST NOT, BE ADOPTED.

349. A boy who is of the same class or caste* with the adopter, and is not the only son of his father, not an orphan, and not disqualified by relation (*c*), age (*e*), or otherwise (*i*), is eligible for adoption.

Vide Precedents, pages 531, 532, 547, 548, 549, 552, 556, 557, 559.

Annotations.

348. It has been ruled, however, that in the case of an adoption made by a widow without having obtained the consent of her husband, or in which the adopted son shall not have been delivered over to her by either of his parents, but only by his brother, the adoption is invalid.†—Macn. H. L., Vol. I, p. 66.

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* In the present time, it is not sufficient that the boy to be adopted should be of the same general class or tribe with the adopter, that is, of one of the four general tribes, (viz., *Bráhmana*, *Kshetriya*, *Voishya* and *Shúdra*,) but they both must be of the same special caste or sub-caste derived from any one (or two) of the general tribes.

† The case of *Tara-munee Debia* v. *Deo-narain Roy* and another, Sudder Dewany Adawlut Report, Vol. III, page 387. The same principle was recognised in the case of *Raja Shum-shere Mull* v. *Ranee Doirej Coomuar*, Vol. II, page 169.—Macn. H. L., Vol. I, p. 66, Note.

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On this subject SHOUNAKA ordains,—"The adoption of a son by any *Bráhmana* must be made from amongst *sapindas* (kinsmen connected by an oblation of food); or on failure of these, one not so connected (*a-sapinda*); otherwise let him not adopt. (*a*)—*Dat. Ch.*, Sect. I, § 10. Authority.

(*a*) Otherwise let him not adopt.] By this, a given son being,—other than a *Bráhmana*, a *Kshetriya*, and so forth,—in short, of a different class, is excluded.—*Ibid.* Exposition.

Thus MANU declares: "He is called a son given, whom his father or mother affectionately gives as a son, being alike* and in a time of distress,* confirming the gift with water." Authority.

In fact, the construction of the word 'alike' (*sadrisha*) in MANU's text, as signifying of the same class, is only proper, for, elsewhere, participating, as an heir, of such adopted son, is shown: and the participating in the inheritance, of one unequal in class, is impossible.—*Ibid.*, § 16. Exposition.

Vriddha GOUTAMA forbids the participation of inheritance of one not of the same tribe thus—"Or should one of a different class be taken as a son, in any instance, let him (the adopter) not make him participator of a share; this is the doctrine of SHOUNAKA."—*Dat. Mím.*, Sect. II, para. 21. Authority.

Hence it is established that, one of a different class cannot be adopted as a son.—*Ibid.*, § 22. Conclusion.

SHOUNAKA:—By no man having an only son (*eka-puttra*) is the gift of that son ever to be made.—*Dat. Mím.* Sect. IV, para. 1.—*Dat. Ch.*, Sect. I, § 29. Authority.

Annotations.

349, 353—356. The first and fundamental principle is, that the person proposed to be adopted be one, who, by a legal marriage with his mother, might have been the legitimate son of the adopter. By the operation of this rule, a sister's son, and offspring of other female, whom the adopter could not have espoused, and one of a different class, are excluded from adoption. In the present age, marriage with one unequal in class, is prohibited.—Sutherland's Synopsis, Head Second.

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* See *ante*, pages 307, 308.

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Authority. The word gift means the establishing another's property after the previous extinction of one's own: and another's property cannot be established without his acceptance: the author (SHOUNAKA) implies this also in the text in question. Therefore a prohibition likewise against acceptance is established by the very text.—*Dat. Mím.*, Sect. IV, § 3. Accordingly—

Authority. VASHISHTHA :—"An only son, let no man give or accept"(*b*). To this he subjoins a reason: "For he is (destined) to continue the line of ancestors." His being intended for lineage, being thus ordained: 'in the gift of an only son, the extinction of lineage is implied.' Now this is incurred by both the giver and adopter also. For the reason (in question) is subjoined, after both (verbs: *viz.*, 'give and accept').—*Dat. Mím.*, Sect. IV, § 3.

Remark. An only son may, nevertheless, be adopted in the *dwyámushyáyana* form.—See the following section.

Annotations.

349. *The person to be adopted.* In a selection for the purpose, consideration is to be had of the *class* to which the child to be adopted belongs; of his relation, as well to the adopter, as to his own family; of his age; and, lastly, to what extent his *initiatory ceremonies* have or have not been already performed. As in marriage, so in adoption, the parties must be of the same class; provided such an one is to be had, and not the adopter of one, and the adopted of another. An adoption of one of a different class from the adopter has, in general, nothing but disqualifying effects. Parted with by his parents, it divests the child of his natural, without entitling him to the substituted, claims, incident to an unexceptionable one. Incompetent to perform effectually those rites, on account of which adoption is resorted to, he cannot inherit to the adopter, but remains a charge upon him, entitled only to maintenance.—Stra. H. L., Vol. I, p. 82.

349—357. It is required that the party adopting should be destitute of a son, son's son, and son's grandson; that the party adopted should neither be the only, nor the eldest, son, nor an elder relation, such as the paternal or maternal uncle; that he should be of the same tribe as the adopting party; that he should not be the son of one whom the adopter could not have married, such as his sister's son or daughter's son. This last rule, however, applies only to the three superior classes, and does not extend to the *Shúdras*. —Macn. H. L., Vol. I, pp. 66, 67.

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(b) "*An only son let no man give or accept*," that is, the boy to be adopted should be one of several sons of his father; because the father of an *only* son is prohibited from giving his son in adoption; also because the father of *several* sons alone is allowed to give a son of his in adoption. Hence a father of two sons is also prohibited from making a gift of one of his sons.* Nevertheless,— Explanation.

350. The adoption of a boy having an only brother is seen in practice, and is not declared to be invalid. *Vyavasthá.*

By parity of reasoning,—

351. The younger of two sons, who has not his elder brother, but has his son, in existence, may also be adopted. *Vyavasthá.*

Annotations.

350. In strictness, to enable a man to give a son to be adopted, it is not sufficient that he have more than one; he should have several; since if, having only two, he part with one, the death of the remaining one, leaving him destitute, would be a contingency not to be risked. It does not, however, appear that this ever prevailed as a rule. If therefore he have two, he may relinquish the younger; and, having but one, he may give that one, if it be, to a brother; it being agreed that the exception of an only son, however operative in families more distinctly related, is not binding in the instance of a nephew, whom, in a spiritual point of view, it is of such moment to obtain, where adoption is required.—Stra. H. L., Vol. I, p. 85.

350, 351. It has already been observed that a man who has a son, son's son, or son's grandson, is not competent to adopt a son: and it would seem to follow, by analogy, that if a man has a son, and the son of an elder son deceased, he may give the former† away in adoption, because he cannot be considered as the father of one son only; the latter also bearing towards him the relation of a son to all intents and purposes, and supplying the place of the elder one. In the *Dattaka-mímánsá*, there is a prohibition against the gift of a son, where there are only two, but the precept is merely dissuasive, and not peremptory.—Macn. H. L., Vol. I, p. 77.

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* See *ante*, page 310, and Sutherland's Note vii.

† In this case the dissuasive precept against giving one of two sons would apply, but the adoption would nevertheless be valid.—*Ibid.*, Note.

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Reason. As in that case he is not without a brother, his brother's son representing his departed father in consequence of the term 'son' signifying issue as far as the great-grandson in the male line.—See *ante*, pp. 29, 30, 269.

Vyavasthá. **352. An eldest son also should not be adopted.***

Vide Precedents, pages 537, 559, 562.

Authority. MANU :—*That son alone*, by whose birth he (the father) discharges his debt, and through whom he attains immortality, was begotten from a sense of duty: all the rest are considered by the wise as begotten from a love of pleasure.—Chap. IX, *v.* 107.

Authority. It must be understood that sons given and the rest (*ádi*),† who have brothers other than the eldest should be adopted by women, if authorized by their husbands, and not otherwise; it being declared by SHOUNAKA that—" By no man having an only son is the gift of a son to be ever made. By a man having several sons such gift is to be made on account of difficulty," and by another *Smriti* that—" let not a person give an eldest son," a woman should neither give nor accept an eldest son, or an only son, since he is to remain to raise up a progeny for (the obsequies of) ancestors.—*Dattaka-siddhánta-manjarí.* Vide *Dattaka-shiromani*, page 37.

Remark. Nevertheless, the prohibition against the adoption of an eldest son is held to be only dissuasive or admonitory, and not mandatory.—See Precedents, page 524.

Remark. The author of the *Dattaka-nirnoya* applies the above prohibition against the giving, rather than against the receiving, of an only or eldest son. The passage to that effect is as follows:—" VASHISHTHA says, 'A son formed of verile seed, and uterine blood, proceeds from his father and mother as an effect from its cause: both parents have power (for just reason) to give, to sell, or to desert him; but let no man

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Annotations.

349, 352. For the interest, that every Hindú father has in his obsequies, restrain the parting for adoption either with his *eldest*, or with an *only son*; it being of such comparative importance to him, that they should be performed by a son of his own, and where he has more than one, by the eldest.—Stra. H. L., Vol. I, p. 85.

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* The eldest son is forbidden to be given in adoption; but some authorities make exception to this.—Stra. H. L., Vol. II, p. 81.

† By the term "rest (*ádi*)," here used, the *son made*, and others, are included.—See *Dattaka-mímánsá*, Section IV, para. 25.

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give or accept an only son, since he must remain to raise up a progeny for (the obsequies of) ancestors. Nor let a woman give or accept a son, unless with the assent of her husband." The prohibition against the giving of an only son is to intimate the incurring of an offence productive of misery in the after-life. The gift and acceptance of sons by women without authority from their husbands is invalid. So also the gift of an eldest son is invalid, because it is said, 'By the eldest son, as soon as born, a man becomes the father of a son;' and the like: (this is) because in giving away the eldest son a great sin is incurred."*—*Dattaka-nirnoya.* See *Dattaka-shiromani,* pages 76, 77.

The author of the *Viváda-bhangárnava* (the English translation whereof is commonly called "Colebrooke's Digest,") adopting the doctrine of '*factum valet*' says—"Let no man accept *an only son,* because he should not do that whereby the family *of the natural father* becomes extinct: but this does not invalidate the adoption of such a son actually given *to him.*"—See *Coleb.* Dig., Vol. III, p. 242.

But the above doctrine of the *Dattaka-nirnoya* as well as that of the *Viváda-bhangárnava,* with respect to the adoption of an only son, has been rejected as inconsistent with the reason of the law. Remark.

(*c*) *Not qualified by relation,*† that is,—

353. The boy, with whose mother the adopter was not prohibited to contract a marriage, or could have carnal connection without incest, can be adopted by him, and not otherwise. *Vyavasthá.*

Vide Precedents, page 549.

"Having taken him by both hands, with the recitation of the prayer, commencing,—'*Devasya-twá,* &c.;' having inaudibly repeated the mystical invocation—'*Angádangát,*' &c.; having kissed the forehead of the child; having adorned with clothes, and so forth, the boy bearing the reflection of a son."—Part of SHOUNAKA'S text. See *Dat. Mím.,* Sect. V, § 15.—*Dat. Ch.,* Sect. II, § 7. Authority.

Reflection of a son.]—The resemblance of a son, or in other words,—the capability to have been begotten by the adopter, through appointment, and so forth.—*Dat. Ch.,* Sect. II, § 8. Exposition.

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* See the foot-note at page 309.

† *Ante,* page 312.

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Exposition. *The reflection of a son.*]—The resemblance of a son,—and that is the capability to have sprung from (the adopter) himself, through an appointment (to raise issue on another's wife), and so forth.—*Dat. Mím.*, Sect. V, § 16.

Authority. Intending this very position, it is declared in the sequel, by the same author :—"The daughter's son, and the sister's son, are declared to be sons of *Shúdras*. For the three superior tribes, a sister's son is nowhere [mentioned] as a son." Here even the term 'sister's son' is *illustrative of the whole not resembling a son*, for prohibited connection is common to them all. Now the prohibited connection is the unfitness (of the son proposed to be adopted) to have been begotten by the individual himself, through appointment [to raise issue on the wife of another]."—*Ibid.*, § 18.

Authority. In the same manner as in the text of *Grihya-parishishta* on marriage, prohibited connection, in the case of marriage, is excepted; so, in the case in question, (one, who, if begotten by the adopter, would have been the son of) a prohibited connection, must be excepted; in other words, a person is to be adopted, of whose mother the adopter might have carnal knowledge. Now, prohibited connection is the unfitness (of the son proposed to be adopted) to have been begotten by the individual himself, through appointment (to raise issue on the wife of another). The mutual relation between a couple being analogous to the one being the father or mother of the other, connection is forbidden; as for instance, the daughter of the wife's sister, and the sister of the paternal uncle's wife. The meaning of the text is this, where the relation of the couple, that is, of the bride and bridegroom, bears analogy to that of father or mother, if the bridegroom be, as it were, father of the bride, or the bride stand in the light of mother to the bridegroom, such a marriage is a prohibited connection.—*Dat. Mím.*, Sect. V, paras. 16, 18, 19, 20.

Vyavasthá. **354.** Accordingly, the brother, paternal and maternal uncles, daughter's son, and sister's son, are excluded.*—*Ibid.* Sect. V, para. 17.

Vide Precedents, page 549.

Reason. For they bear not resemblance to a son.—*Ibid.*

Annotations.

353—356. The first and fundamental principle is, that the person proposed to be adopted be one, who, by a legal marriage with his

* Sutherland's Synopsis, (1st Ed.,) p. 214.

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According to the *Dattaka-mímánsá* and some other authorities,—

355. A brother's son cannot be adopted by his father's sister. *Vyavasthá.*

Vide Precedents, pages 552—555.

Vriddha GOUTAMA declares the same. In the three superior tribes, a sister's son (*d*) is nowhere (mentioned as) a son.—*Dat. Mím.*, Sect. II, § 32. Authority.

(*d*) The expression "sister's son" is inclusive of the son of a brother also. Hence this meaning is deduced that, a bro- Explanation.

Annotations.

mother, might have been the legitimate son of the adopter. By the operation of this rule, a sister's son, and the offspring of other females whom the adopter could not have espoused, and one of a different class, are excluded from adoption. In the present age, marriage with one unequal in class is prohibited.—Sutherland's Synopsis, Head Second, § 1.

349, 352,—357. That the party adopted should neither be the only nor the eldest son, nor an elder relation, such as the paternal or the materal uncle ; that he should be of the same tribe as the adopting party ; that he should not be the son of one whom the adopter could not have married, such as sister's son or daughter's son. This last rule, however, applies only to the three superior classes, and does not extend to *Shúdras*.—Macn. H. L., Vol. I, pp. 66, 67.

354—357. The general principle, as laid down in a recent work of great weight upon the whole of this subject, is, that one with whose mother the adopter could not legally have married, must not be adopted. And the exclusion seems to hold, applying the principle to the sex, where the adoption is by a female. Though the adopted be not the actual son of the adopter, he is to resemble, and come as near to him as possible. He is to be at the least, such, as that he might have been his son. But the adopter could not have married his own mother ; it is a prohibited connection. Consequently, his brother cannot be adopted by him. The same consideration excludes the paternal and maternal uncles ; the daughter's son and the sister's son. It must be noticed, however, that these two latter are eligible to adoption among *Shúdras* ; if not also in the three superior classes, notwithstanding positions to the contrary, no other being procurable.—Stra. H. L., Vol. I, p. 83.

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ther's son must not be adopted by a sister.—*Dat. Mím.*, Sect. II, para. 33.

MANU :—If one among brothers of the whole blood [*eka-játa*] be possessed of male issue (*putra-ván*), MANU pronounces, that they all are fathers of the same, by means of that son.—Chap. *v.* 182.—*Dat. Mím.*, Sect. II, § 29.

Exposition. *Of the whole blood.*] By this expression, it appears, that this condition of adoptive fathers, alluded to, applies to those only begotten by the same father on the same mother, not to such as are born of a different father or mother.—*Dat. Mím.*, Sect. II, para. 31.

Exposition. *Brothers.*] From the masculine gender being used, it results, that, brothers and sisters also, of the whole blood, are not reciprocally the adoptive parents of the son [of any one of them] ; and this conclusion is confirmed by the mention of two terms [in that gender].—*Ibid.*, § 32.

Authority. Since by "*eka-játa,*" the epithet of 'brothers' it is intimated that those (signified by that term) are of the same kind, the affiliation, by brothers, who are male, of a brother's son, and by sisters, who are female, of a sister's son, would be established. The adoption of brother's son by a sister, or a sister's son by a brother, could not take place; on account of the difference of their kind, in being male and female (respectively).—*Dat. Mím.*, Sect. II, § 34.

Authority. "If one among brothers of the whole blood, be possessed of male issue, MANU pronounces that they all are fathers of the same, by means of that son." By the expression of the term "whole blood,"—uterine brothers are understood. Again, the term brother is used to indicate that neither can a brother adopt his sister's son, nor a sister her brother's son.—*Dattaka-dídhiti.* Vide *Dattaka-shiromani,* p. 51.

By parity of reasoning,—

Vyavasthá. **356. A son of such man cannot be adopted by a woman to whom she could not have been legally married, or with whom she could not have carnal connection without incest.**

Vide Precedents, pages 552—555.

Annotations.

355, 356. NANDA PANDITA declares that a woman may not affiliate a brother's son : if his opinion be correct,* it might be

* See Precedents, pp. 552—555.

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The above four rules are not, however, applicable to the *Shúdras*,—because, having relation solely to the regenerated classes, they exclude the *Shúdras*, and because, in the text subjoined, the adoption of a sister's son or daughter's son by a *Shúdra* is declared to be lawful. Therefore,— Remark.

357. A sister's son, a daughter's son, or the son of such female relation as was prohibited from being married to the adopter may be adopted by a *Shúdra*. *Vyavasthá.*

Vide Precedents, pages 552, 560, 562.

"Of *Kshetriyas*, in their own class positively; and (on default of a *sapinda*, a kinsman) even in the general family, following the same primitive spiritual guide (1): of *Voishyas*, from amongst those of the *Voishya* class (*Voishya-játishu:*) of *Shúdras*, from amongst those of the *Shúdra* class. Of all, and the tribes likewise, (in their own) classes only; and not otherwise. But a daughter's son, and the sister's son, are affiliated by *Shúdras*. For the three superior tribes, a sister's son is nowhere (mentioned as) a son." SHOUNAKA.—*Dat. Mím.*, Sect. II, § 74.—*Dat. Ch.*, Sect. I, para. 17. Authority.

Intending this very position, it is declared in the sequel by the same author (SHOUNAKA):—"The daughter's son, and the sister's son, are declared to be sons of *Shúdras*. For the three superior tribes, a sister's son is nowhere mentioned as a son." Here even the term 'sister's son' is illustrative of the whole not resembling a son.—*Dat. Mím.*, Sect. V, § 18. Authority.

Annotations.

consistently argued that, where a woman is proceeding to adopt with the sanction of her husband or kindred, she must not select generally one with whose father she could not have legally married. —Sutherland's Synopsis, Head Second.

(1) "Even in the general family, following the same primitive spiritual guide."—Since there are no distinct and peculiar general families of (primitive) *Kshetriyas*, the general family following the same primitive spiritual guide is specified; for it is declared, in the passage subjoined that, one of the tribes in question participates in such general family: "He specifies the general families of *Kshetriyas*, and *Voishyas*, as distinguished by following the same primitive spiritual guide."—*D. Ch.*, Sect. I, § 18.

The general families of *Kshetriyas* and *Voishyas* are distinguished by the primitive saint or patriarch hereditarily acknowledged in the family. This is not the case with *Brâhmanas*,

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Exposition. This part of the text ("but a daughter's son, &c.") propounds an exception, as to those of the first three tribes, with respect to the daughter's son, and sister's son inferred from the mention of propinquity in general. Since (the particle 'but,' having an exclusive import,) a restriction, "by *Shúdras* only," is conveyed; those of the first three tribes are excluded. On this point the author subjoins a reason: "For the three superior tribes, &c., &c." Since the filial relation of a sister's son to one of the first three tribes is not exhibited in any authority whatever, the passage is relative only to *Shúdras*. This is the meaning of the whole. —*Dat. Mím.*, Sect. II, § 91—93.

Vyavasthá. **358.** Even amongst the boys of one's own caste, he who is related as a *sapinda** is preferable to one who is not so.

Authority. SHOUNAKA:—The adoption of a son by any *Bráhmana* must be made from amongst *sapindas*, or kinsmen connected by an oblation of food; or, on failure of these, an *a-sapinda*, or one not so connected, may be adopted: otherwise let him not adopt.—*Dat. Ch.*, Sect. I, § 10. *Dat. Mím.*, Sect. II, § 2.

Exposition. "*From amongst the sapindas*,"—that is, from among such kinsmen, extending to the seventh degree inclusive.† And

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Annotations.

the *gotra* or general family of whom is determined by lineal descent, from the same particular saint.‡—Note to para. 76, Sect. II, *Dat. Mím.*

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* See *ante*, pp. 102, 103, and the section treating of *Sapindas*.

† "*Kinsmen extending to the seventh degree inclusive*"—that is, seven degrees or generations from the great-grandson to the paternal great-grandfather inclusive, and the persons who present to them the oblations of food in the *Párvana*. The said seven persons and their sons' sons and great-grandsons are *sagotra sapindas*, or kinsmen of the same general family, and the grandsons in the female line of those seven persons are *sapindas* of a different general family.—See *ante*, pp. 102, 103.

‡ Mr. Sutherland says: "*Shúdras* again are all supposed to belong to the *gotra* of KASHYAPA, the common progenitor of the four tribes." Upon this it is to be remarked that, on such assumption not only the *Shúdra* but also the other three tribes may be supposed to belong to the *gotra* of KASHYAPA; yet the different families of each of the three superior classes have several *gotras* including that of KASHYAPA, and each *Shúdra* family, like that of a *Voishya*, has the *gotra* of its primitive spiritual guide. Although it appears from the texts: "Even in the general family following the same spiritual guide," and "The general families of *Kshatriyas* and *Voishyas* are distinguished by following the same primitive spiritual guide," and from their interpretations in the *Duttaka-mímánsá* that in adoption among the *Shúdras* the rule of giving preference to one's own *gotra* is not observable, and

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the term being used in its general sense, it follows—from among such kinsmen belonging to the same or different general family (*gotra*).—*Dat. Mím.*, Sect. II, § 3.

Here, since it is mentioned generally 'from amongst *sapindas*,' it is meant, from such, both of the same, or a different, general family.—*Dat. Ch.*, Sect. I, § 11. Exposition.

Those not *sapindas* are kinsmen beyond the seventh degree, and persons not allied at all. And these also are of two descriptions: those belonging to the same, and those belonging to a different, general family.—*Dat. Mím.*, Sect. II, para. 10. Explanation.

359. Of the *sapindas* again, he who is of the same *gotra** with the adopter is preferable to such kinsmen of a different *gotra*, who is eligible on failure of the former. *Vyavasthá.*

360. In default of a *sapinda* of a different *gotra*, one who is not a *sapinda*, but a *sodaka* or *samánodaka*,† is eligible for adoption;—failing him, one merely of the same *gotra*; and on defect of such, one who is neither a *sapinda*, nor a *sodaka*, nor of the same *gotra*, but only of the same caste with the adopter. *Vyavasthá.*

On default of a *sapinda* kinsman, one belonging to the same general family (*gotra*), and, failing the latter, a person even of a different general family is to be adopted. SHÁKALA declares this.—*Dat. Ch.*, Sect. I, § 11. Authority.

Of what has preceded, this is the abstracted meaning.—The *sapinda* belonging to the same general family (*gotra*), is the first [in rank]: on failure of him, such kinsman of a different general family.—*Dat. Mím.*, Sect. II, § 11. Authority.

Although the *sapinda* of a different family (*gotra*), and a person of the same family, but not a *sapinda*, are both equal, with respect to their severally wanting a quality possessed by the other; still, however, by reason of propinquity, the individual, deriving his claim from the connection as *sapinda*, is preferable to him claiming by family; and hence it is that, though of a different family, a *sapinda*, even from the family of the maternal grandfather, must be adopted.—*Ibid.*, para. 12. Authority.

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although it is not expressly ordained by any saint that *Shúdra* families have the same *gotras* as their primitive spiritual guides, yet it seems implied in a text of MANU that they have *gotras* like the *Voishya* families.

* See *ante*, pages 174, 175. † See *ante*, pages 106, 107.

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Authority. In every case, on default of a "*sapinda*," one not related as such is to be adopted: of this description, the kinsman allied by a libation of water (*sodaka*) to the fourteenth degree, being of the same general family, is the nearest; on failure of him, one not so allied, but of the same general family, to the twenty-first degree; and on defect of such also, one not belonging to the same general family, and not related a '*sapinda*.'—*Ibid.*, § 13.

Authority. VASHISHTHA also propounds the same—"Should take an unremote kinsman, or near relation of a kinsman, &c."—*Dat. Mím.*, Sect. II, para. 15.

Exposition. The construction of this passage is thus:—'He is an unremote kinsman, who is both a kinsman, and in a near degree; meaning, a near '*sapinda*.' Now propinquity is of two descriptions,—by belonging to the same general family, and by the intervention of a few degrees. Of those allied by propinquity, the '*sapinda*' of the same general family, and removed by a few degrees, is the principal; on default of him, a '*sapinda*' of the same general family, though removed by many degrees; on failure of such, a *sapinda* belonging to a different general family: on defect of this latter also, 'the near relation of a kinsman,'—meaning of a *sapinda* kinsman, the near relation or '*sapinda*,'—being one allied to the individual himself by libations of water (*sodaka*), but not his '*sapinda*.' Such is the import which is deduced."—*Dat. Mím.*, Sect. II, § 16.

Although none other than such is connected as a '*sapinda*,' and not so, can exist: still, since by this sequel of the text, ("of all, and the tribes likewise, in their own classes only, not otherwise,") those connected as *sapindas*, and not so, are qualified, as being of the same class; both *sapindas*, and those not such, who do not belong to the same class, are excluded [from being adopted]. For they might be inferred as a subordinate class by the rule of logic "What is not denied is admitted."—*Ibid.*, § 20.

Authority. "The adoption of a son by any *Bráhmana* must be made from amongst his *sapindas* (kinsmen connected by an oblation of food); or, on failure of these, from amongst those who are not so connected (*a-sapindas*); otherwise let him not adopt." By this and other texts of SHOUNAKA, (adoption) is ordained to be made from amongst *sapindas* and the rest. Amongst them even * * * a (whole) brother's son endued with good qualities is preferable;—in default of him, any *sapinda* of the same *gotra*;—failing him, one who is not of the same *gotra*, and not also a *sapinda*. It is thus determined in the *Mitákshará* and other books.—*Dattaka-*

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siddhánta-manjarí. So also the *Dattaka-dídhiti.* Vide *Dattaka-shiromani,* pages 6 and 19.

The *Dattaka-darpana,* as well as the *Dattaka-chandriká* prefers one of the same *gotra,* though not a *sapinda,* to a *sapinda* of a different *gotra.* The passages to the above effect are as follow :— Remark.

On default of a *sapinda* kinsman, one belonging to the same general family, and failing this latter, a person even of a different general family, are to be adopted. SHÁKALA declares this—"Let one of a regenerate tribe, destitute of male issue, on that account, adopt as a son the offspring of a *sapinda* relation particularly; or also, next to him, one born in the same general family. If such exist not, let him adopt one born in another family, except a daughter's son, and a sister's son, and the son of a mother's sister."—*Dattaka-chandriká,* Sect. I, § 11.

It being ordained by SHOUNAKA that—"By a *Bráhmana* (adoption must be made) from amongst *sapindas,* * * * otherwise let him not adopt," a son must be adopted from one's own class. So the *Dattaka,* or son given, is of four kinds; *viz.,*—a *sapinda* of the same *gotra;* failing him, a person of the same *gotra,* but not a *sapinda;* in his default, a *sapinda* of a different *gotra;* and on defect of such, one who is neither a *sapinda* nor of the *same gotra.* Amongst the *sapindas* of the same *gotra,* a (whole) brother's son is preferable to the rest by reason of his propinquity being the nearest.—*Dattaka-darpana.* Vide *Dattaka-shiromani,* page 87.

361. Again, amongst the *sapindas, sodakas,* and persons merely of the same *gotra,* the nearest of them is eligible in preference to the rest, and so on, according to the proximity in order, whence a whole brother's son is the first in rank, and eligible for adoption in preference to all. *Vyavasthá.*

In respect, however, to this subject, [it is to be observed that,] where a brother's son may exist, amongst near kinsmen, he only is to be adopted. Thus MANU ordains: "If one, among brothers of the whole blood, be possessed of male issue, MANU pronounces that they all are fathers of the same, by means of that son." VRIHASPATI [also] :—"If there are several brothers, the sons of one man, by the same mother, on a son being born to one even of them, all of them are declared to be fathers of male issue." Under these Authority.

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two texts, if a brother's son is in any manner *capable* of being a substitute, it is inferred that another is not to be adopted.—*Dat. Ch.*, Sect. I, § 20.

Authority. SHÁKALA has declared this:—"Let a regenerate man, being destitute of male issue, adopt a son, the offspring of a *sapinda* kinsman; or next in order, the son of one of the same general family (*sa-gotra*): on defect of such, let him bring up one born in a different general family."—By the expression "*sa-gotra*," those allied by a libation of water (*sodaka*) and belonging to the same general family, are included.—Now, in this text, the proximity (in order) of each successively is particularly shown.—*Dat. Mím.*, Sect. II, para. 14.

Authority. Amongst near *sapindas* (kinsmen of the same general family) a brother's son only must be affiliated; and this doctrine is recognised also by VIJNÁNESHWARA. By the position, that, a brother's son only must be affiliated, it is meant that the son of a whole brother only must be affiliated.—*Dat. Mím.*, Sect. II, § 28, 29.

Conclusion. Hence it is a settled point that amongst near "*sapinda*" kinsmen of the same general family (*gotra*), a brother's son only must be affiliated, and, therefore, by being adopted [the brother's son and other kinsmen], are first in participating in the estate and funeral oblations; but, not being adopted, they hold their respective places [in the order of heirs].—*Dat. Mím.*, Sect. II, § 67.

Authority. If no brother's son exist, another even, being the nearest relative, according to the mode mentioned [must be adopted]. Conformably SHOUNAKA [continues]: "Of *Kshatriyas*, in their own class positively: and [in default of a *sapinda* kinsman] even in the general family, following the same primitive spiritual guide (*guru*): of *Voishyas*, from amongst those of the *Voishya* class (*Voishya-játishu*); of *Shúdras*, from amongst those of the *Shúdra* class. Of all, and the tribes likewise, [in their own] classes only; and not otherwise. But a daughter's son and a sister's son are affiliated by *Shúdras*. For the three superior tribes, a sister's son is nowhere [mentioned as] a son."—*Dat. Mím.*, Sect. II, § 74.

Remark. "Offspring must be produced: this precept is peremptory: in some manner, or another, it must be complied with." Since the representation of the filial relation here [contemplated,] obtains in the brother's son; the effects thereof, *viz.*, the oblation of the funeral cake, libation of water, and the like, and exemption from exclusion from heaven, would be accomplished [by his existence]: hence, there can be no occasion to proceed in the re-attainment of the same: conse-

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quently a brother's son, though unadopted, is filially related, in conformity with this text of *Vrihat* PARÁSHARA: "Let the nephew of a paternal uncle, destitute of male issue, be his son; he only should perform his obsequies, of the funeral repast, and of oblations of food, and of water." Hence a brother's son existing, no affiliation [of him or another], as a son given, and so forth, takes place." This is not to be argued: for, although, by reason of the nephew's possessing the representation of the filial relation, he may be the means of procuring exemption from exclusion from heaven, and so forth: still, as the celebration of name, and the due perpetuation of lineage, would not be attained, for the sake of the same, the constituting of him [an adopted son] is indispensable. Besides, the two texts in question do not prohibit, where a brother's son may exist, the constituting of (him, or another), a son given, and so forth; but indicate, (as inherent in a nephew) the virtue of a son, consisting in the capacity to perform the funeral repast, and so forth. For, otherwise, a contradiction of the rule for the production of a *kshetraja* son, notwithstanding a brother's son may exist, would follow; and since, by the text subjoined, the resemblance of son's son obtains in a daughter's son according to the reasoning recited, the non-adoption of a son given, and the rest, where a daughter's son also might exist, would result. "By that male child, whom a daughter, whether formally appointed or not, shall produce, from a husband of an equal class, the maternal grandfather becomes the grandsire of a son's son: let that son give the funeral oblation, and possess the inheritance."—*Dat. Ch.*, Sect. I, paras. 21, 22.

But, if a brother's son exist, the affiliation of him only is indispensable; where there may be only one brother's son, in that case the adoption cannot take place on account of the text of VASHISHTHA, which recites:—"An only son, let no man give or accept. For he is destined to prolong the line of his ancestors."—Should this be alleged it is inaccurate, for, the text in question, is applicable to a case, other than that of the *dwyámushyáyana*, or son of two fathers. In case of the *dwyámushyáyana*, extinction of lineage, contemplated in the clause of the text containing the reason, would not take place.—*Dat. Ch.*, Sect. I, § 27, 28. Authority.

Either portion [of the passage from VRIHASPATI,] has been made clear by DEVA-SWÁMI in this text—"In both, even, [it is meant that,] another substitute must not be adopted." And this text is thus interpreted in the *Chandriká*; "'In both even'—in the two texts commencing, ('If there are several brothers, the sons of one man, &c.') [it

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is meant that,] the son of a brother, and that of a rival wife, being anyhow capable of being substitutes, another must not be adopted as a substitute."—*Dat. Mím.*, Sect. II, § 72.

VIJNÁNESWARA also thus explains the text of MANU: "[This text] is intended to forbid the adoption of others, if a brother's son can possibly be adopted: it is not intended to declare him son of his uncle: for, that is inconsistent with the subsequent text, 'brothers likewise, and their sons, &c., &c.'"—*Ibid.*, § 73.

"If there are several brothers, the sons of one man, by the same mother, on a son being born to one even of them, all of them are declared to be fathers of male issue. The same rule is also ordained in respect to many wives of the same person: if one brings forth a son, he is the presenter of the funeral cake to the whole." As for the application by analogy of the rule regarding the brother's son, to that of the rival wife, declared by VRIHASPATI, in this text: that is propounded as meaning, [the son of the rival wife] to be a subsidiary son, not as intending his affiliation: for his filial relation [to his step-mother] is established from his proceeding from portions of her husband. Also the fact of being a substitute, being established from proceeding partially from portions [of the pair], the text [of MANU] intends a restriction, [as to substitutes, not so circumstanced,] as has been already declared.—*Dat. Mím.*, Sect. II, § 71.

The *Kalpa-taru, Párijáta,* CHANDESHWARA, VÁCHASPATI MISRA, BANSA-DHARA, RUDRA-DHARA, HARI-NÁTHA, and other authorities of the *Mithilá* school, forbid the adoption of a *kritrima* or any other sort of son, when there existed a brother's son; whilst the *Dattaka-mímánsá, Dattaka-chandriká, Mitákshará, Dattaka-nirnoya, Dattaka-siddhánta-manjarí,* and some other treatises on adoption, maintain that another person must not be adopted while a brother's son is capable of being, and can possibly be, adopted. The latter doctrine is reasonable as well as prevalent.

Vyavasthá. **362.** The above rules of preferentially adopting the nearest kinsman is, however, to render such adoption a laudable one, and not to invalidate the adoption of a remote kinsman or even of a stranger, while the nearest or a nearer kinsman was available for the purpose.

Vide Precedents, pages 552. 561.

Annotations.

362. Where there is a brother's son, he should be selected for adoption in preference to all other individuals; but this is not

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363. But though the adoption of the nearest relation be a laudable one, still such relation, if an orphan, cannot be adopted in the *dattaka* form.* *Vyavasthá.*

Vide Precedents, pages 547, 548.

Annotations.

universally indispensable, so as to invalidate the adoption of a stranger. In the case of *Ooman Dutt*, pauper, appellant, versus *Kunhia Singh*, it was held that, while a brother's son exists, the adoption of any other individual is illegal ; and this is undoubtedly consonant to the doctrine contained in the *Dattaka-mímánsá*,† but it is controverted in the *Dattaka-chandriká*. It would appear, however, that, according to the law of Bengal and elsewhere, where the doctrine of the latter authority is chiefly followed, and where the doctrine of "*factum valet*" exists, a brother's son may be superseded in favor of a stranger ; and even in Benares, and the places where the *Mímánsá* principally obtains, and where a prohibitory rule has in most instances the effect of law, so as to invalidate an act done in contravention thereto, the adoption of a brother's son or other near relative is not essential, and the validity of an adoption actually made does not rest on the rigid observance of that rule of selection, the choice of him to be adopted being a matter of discretion. It may be held, then, that the injunction to adopt one's own *sapinda*, (a brother's son is the first,) and failing them, to adopt out of one's own *gotra*, is not essential, so as to invalidate the adoption in the event of departure from the rule.—Macn. H. L., Vol. I, pp. 68, 69.

If duly authorised, the widow may, no doubt, adopt, and is enjoined to give the preference to the nearest relation who is eligible. (See *Dattaka-mímánsá*.) But the validity of an adoption actually made does not rest on the rigid observance of that rule of selection ; the choice of him to be adopted being a matter of discretion.—Colebrooke's remarks. See Stra. H. L., Vol. II, p. 98.

It is not incumbent on a person to adopt the son of a brother, or other *sapinda*. The law merely states this as preferable, but without prescribing it ; certainly it does not give to the *sapinda* any right to enforce such a preference, and the appellant could not, therefore, I am clear, maintain this action.—*Ibid.*, 104.

362. But the result of all the authorities upon this is, that the selection is finally a matter of conscience and discretion with the adopter, and not of absolute prescription, rendering invalid the

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* See *ante*, pp. 306—312. † Such is not exactly the case.

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Reason. Because, to constitute the valid adoption of a son given (*dattaka*), there must be a gift of him in adoption by his *natural parents*, or by *either* of them,* which there cannot be in the case of an orphan.

Explanation. *(e) Not disqualified by age.*†]—That is, the person whose age is above that which is prescribed for adoption is not qualified for the purpose.

Remarks. In regard to the proper age for adoption, there is much diversity of opinions.

Age for adoption. The proper age for adoption has been differently defined by the authorities‡ who have written on the law of adoption. The author of the *Dattaka-mímánsá*, citing the following texts as of the *Káliká-purána*, has acquiesced in the doctrine therein inculcated, adding, however, by way of explanation of the text No. 2, that the son adopted, after having been initiated under the family name of his natural father, does not exclusively become the son of the adopter, but is a *dwyámushyáyana*, or son of two fathers. "Sons given and the rest, though sprung from the seed of another, yet being duly initiated under his own family name, become sons. O Lord of the earth, a son, having been initiated under the family name of his father, unto the ceremony of tonsure inclusive, does not become the son of another man (*f*). The ceremony of tonsure and other rites (*chúdádyá*) of initiation being indeed performed under his own family name,

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Annotations.

adoption of one, not being precisely the one, who, upon spiritual considerations, ought to have been preferred.—Stra. H. L., Vol. I, page 85.

362. It has been intimated by writers of law,§ that proximity of kindred ought to determine in the choice of an adopted son. But NANDA PANDITA extends the principle with elaborate minuteness; it cannot be regarded as a rigid maxim of law vitiating the adoption of a remote where a near kinsman, or of a stranger where a relative, may exist. The right, however, of a whole brother's son, to be adopted in preference to any other person, where no legal impediment may obtain, seems to be generally admitted, and may be regarded as a received rule of law.—Sutherland's Synopsis, Head Second.

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* See *ante*, pages 306—312. † *Ante*, page 312.

‡ VASHISHTHA, SHOUNAKA, &c.

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sons given and the rest may be considered as issue:* else, they are termed slaves. After their fifth year, O king! sons given and the rest are not sons. (But) having taken a boy five years old, the adopter should first perform the sacrifice for male issue.—*Dat. Mím.*, Sect. IV, § 22.

(f) He does not become exclusively the son of another man, but is a *dwyámushyáyana*, or son of two fathers.—*Dat. Mím.*, Sect. VI, § 43.

Remark. RAGHU-NANDANA too has cited the same passage as from the *Káliká-purána*; and he and his followers have construed the passage as an unqualified prohibition of the adoption of a youth or child, whose age exceeds five years, and especially one whose initiatory rites, as far as tonsure inclusive, have been performed in the family of his natural father.†

Remark. According to JAGAN-NÁTHA, the compiler of the Digest, the said passage constitutes an absolute prohibition of any adoption whatsoever of one whose age exceeds five years, or on whom the initiatory rite of tonsure may have been performed in the family of his natural father.‡

Remark. And, in the case of *Keerat-narain* v. *Bhoobunessuree* (I. S. D. A. Rep., 161), in which the adoption of one older than five years was contended to be illegal, on the opinion of its *pandits* declaring, according to the *Hindú* law, as received in Bengal, the adoption of such person to be legal, provided the initiatory rites (*sanskárá*) in the family of the natural father, have not been, and in that of the adoptive father be, performed, the Sudder Dewany Adawlut appears

* The following appears to be the doctrine of NANDA PANDITA, from his elaborate and intricate gloss on the passage referred to, which is attributed to the *Káliká-purána*. The most preferable object for adoption is a child wholly uninitiated: his filial relation proceeds from the performance by the adopter of initiatory rites. Next in rank to him is one initiated as far as tonsure exclusive, for the performance of which the period from the third to the fifth year is prescribed. Inferior, as an object of adoption, is one whose tonsure has been performed by his natural father, who, provided he be under six years of age, may be adopted, and acquires filial relation to the adopter, on the performance, by that person, of the different initiatory rites, preceded by a sacrifice for male issue (*putreshti*). Such son, from his having been initiated in tonsure and other rites in both families, is a *dwyámushyáyana*, or son of two fathers. It is to be observed that NANDA PANDITA, in the abstruse gloss noticed, seems to have betrayed himself into an inconsistency. According to his explanation, if the boy proposed to be adopted has not been initiated in the rite of tonsure by his natural father, he cannot be adopted after having attained his fifth year; if, however, he has been so initiated, he may be affiliated, (provided he be under six years of age), a sacrifice and so forth being observed, as already noticed.—Sutherland's Synopsis, Note XI.

† See *Dattaka-mímansá*, Sect. IV, § 22, Note, and *Mitákshará*, Coleb., Ch. I, Sect. xi, § 13, Note.

‡ See Sutherland's Synopsis, Head Second, § 7.

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to have determined the following points as applicable to Bengal:—(1) that adoption is restricted to no particular age; (2) that one initiated in tonsure, in the name and family of his natural father, is incapable of adoption; (3) that the age of the person selected for adoption must be such as to admit of the ceremony of tonsure being performed in the adopter's name and family.

Remark. Now the doctrine of the *Dattaka-mímánsá* above alluded to cannot be received as the law of Bengal, by reason of its being different from that inculcated by the *Dáttaka-chandriká*, which in this country is respected as of paramount authority, and is followed in preference to all authorities, on the subject of adoption.*

Remark. As to the opinion of RAGHU-NANDANA and his followers, including JAGAN-NÁTHA, which is based solely upon the passage in question as from the *Káliká-purána*, it is to be observed that the genuineness of that passage itself is questioned by many authors, particularly by the author of the *Dattaka-chandriká*.†

Remark. Even allowing the opinion of RAGHU-NANDANA and his followers not to be an unfounded one, still it cannot be, as it has not hitherto been, followed in practice, being, as it is, at variance with the doctrine of the *Dattaka-chandriká*, the paramount guide of the Bengal school on the subject of adoption. Should it be alleged that, being cited by many of the compilers, some of whom are writers of great author-

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* The difference of opinion between these two authorities with respect to this point, arises from a difference of grammatical construction. The term in the original is '*Chúdádyá* (ceremonies having tonsure at the beginning),' which is a compound epithet termed '*bahu-bríhi*,' which is again divided into *tadguna sambijnána bahu-bríhi*, and *atadguna sambijnána bahu-bríhi* (inclusive and exclusive). The author of the *Dattaka-chandriká* maintains that the term *Chúdá* is included in the expression *Chúdádyá*, and consequently is of opinion that rites after the *Chúdá*, that is, commencing with the investiture, are required to be performed in the family of the adopter; whereas the author of the *Dattaka-mímánsá*, maintaining that *Chúdá* is not included in *Chúdádyá*, holds that rites commencing with, that is including, *Chúdá*, are to be performed in the adopter's name and family.—See *Dat. Ch.*, Sect. II, § 29; and *Dat. Mím.*, Sect. V, § 22.

† The limitation to the age of five years is founded on a passage in the *Káliká-purána*, but the authority of the passage is doubtful. The *Dattaka-chandriká* makes no mention of it, though the *Dattaka-mímánsá* does. The latter being a Benares authority, it may be proper to apply the limiting principle to that province, but not to Bengal or the Deccan, where that principle is not only not recognised, but where it is denied, and adoptions continually take place at an age far exceeding five years.—Macn. H. L., Vol. I, page 74.

See Stra. H. L., Vol. I, p. 75, Vol. II, p. 230; Sutherland's Synopsis, Head Second; and *Mitákshará*, Chap. I, Sect. ii, § 13.

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ity, such as the author of the *Dattaka-mímánsá*, the passage of the *Káliká-purána* in question must be received (whatever may be thought of its authenticity) as the expression of a doctrine that has their sanction,—the reply would be, that still it cannot be accepted as the doctrine of the Bengal school, when a different doctrine on the subject has been inculcated in the *Dattaka-chandriká*, which has been adopted here as the law on adoption, and has been invariably and unscrupulously followed in practice, in preference to all other authorities on the subject.*

Remark.

The compilation of RAGHU-NANDANA is, no doubt, respected in Bengal as a very high authority, yet on the subjects of inheritance and adoption preference is given respectively to the *Daya-bhága* of JÍMÚTA-VÁHANA and *Dattaka-chandriká* of DEVÁNANDA BHATTA.

Remark.

As regards the Sudder Court's determination above alluded to, its defects will be known from the remarks upon it by Mr. Sutherland. They are as follow :—"The limitation of adoption to any particular age is thus overruled: but without presuming to question, as applicable to Bengal, the accuracy of the other two points of law resulting from the decision referred to, there is no impropriety in expressing a doubt, whether they can be received as constituting a general rule universally decisive on the questions which they regard.—(1) Such rule would be at variance with the doctrines of the *Dattaka-mímánsá* and *Dattaka-chandriká*; (2) the authenticity of the passage attributed to the *Káliká-purána*, on which the opinion of JAGAN-NÁTHA and the *pandits* of the Sudder Dewany is founded, is justly denied, and is interpreted as admitting the adoption of one, although initiated in tonsure, by his natural father."—Synopsis, Head Second, § 8.

Remark.

Thus the decision in question, which professes to be applicable to Bengal, being at variance with the doctrine of the *Dattaka-chandriká*, and consequently of the Bengal school, of which that work is the paramount guide, I do not know how it can be followed in practice without acting contrary to the long established doctrine of the country.

Conclusion.

Observing such discrepancies amongst the different authorities regarding the proper age for adoption, I have taken care to record the following *vyavasthás* in accordance with the doctrine of the *Dattaka-chandriká*, as no *vyavasthá* repugnant to its doctrine can in this country be followed in practice, and the principles thereof have been unscrupulously and judiciously adopted for Bengal by almost all the Law officers and European authorities.

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Vyavastká. **364.** The period for adoption of a boy of the *Bráhmana, Kshetriya*, or *Voishya* caste is extended to his *upa-nayana* (*g*), and of the *Shúdra* caste, to his marriage.*

Vide Precedents, pages 487, 556—558.

Explanation. (*g*) *Upa-nayana* is the investiture with the characteristic cord. It is subsequent to the ceremony of *chúdá-karana* (tonsure), which may take place either immediately or some time before the *upa-nayana*.—For these ceremonies, see *ante*, page 145.

Authority. If merely the investiture be performed (by the adopter, the previous rites having been performed by the natural father,) the filiation of the son given, as son of the adopter, is completed; in conformity with the text of VASHISHTHA subjoined:—"Sprung from one following a different *shákhá*, (or branch of the *Vedas*,) the given son

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Annotations.

364. In the *Dattaka-chandriká*, the period fixed for adoption is extended, with respect to the three superior tribes, to their investiture with the characteristic cords, which ceremony is termed *upa-nayana*, and is subsequent to that of tonsure or *chúdá-karana*: and with respect to *Shúdras*, to their contracting marriage.—Macn. H. L., Vol. I, page 72.

The most general and consistent rule, which presents itself, is this —"Any person on whom the adopter may legally perform the *upa-nayana* rite is capable of being affiliated as a *dattaka* son."—Sutherland's Synopsis, Head Second.

The subjoined appears to be the substance of the doctrine of the *Dattaka-chandriká* resulting from the most abstruse part of the work,—1st, the most preferable object of adoption, is one, for whose *upa-nayana* rite, the prescribed principal season has not elapsed: the previous rites performed by the natural father are not to be renewed. Such son becomes filially related by the mere performance of the rite in question; 2nd, inferior as an object of adoption, is one, for the performance of the *upa-nayana* rite on whom the principal season has elapsed. In the case of such adoption, the sacrifice for male issue must be observed, and the rites of tonsure and the rest, be performed by the adopter, on the adopted.—Sutherland's Synopsis, Note XI.

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* Marriage is the only initiatory ceremony for a *Shúdra* (*ante*, p. 145). It being therefore absolutely necessary for a *Shúdra* adopter to perform that ceremony in his own name, the period for adoption of a *Shúdra* boy is extended to the time of his marriage.

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even, when invested with the characteristic thread, under the family-name of the man himself, according to the form prescribed by his peculiar *shákhá*, becomes participant of the duties of such *shákhá*."—*Dat. Ch.*, Sect. II, § 23.

But this must be understood in respect to an adoption taking place within the primary season for the rite in question, which extends to the eighth year. (*h*)—*Dat. Ch.*, Sect. II, para. 23. Remark.

(*h*) "Extending to the eighth year."—This is, the primary season for the *upa-nayana* of a *Bráhmana*, the primary seasons for the *upa-nayana* of *Kshatriyas* and *Voishyas* being respectively within the eleventh and twelfth years calculated from their conception; as will be known from the text of MANU hereafter cited. By the term "eight years" is meant the eighth year from the date of conception: this also is clear from the same text of MANU. Explanation.

"Oh Lord of the earth! a son having been regularly initiated, under the family-name of his (natural) father, unto the ceremony of tonsure, does not become the son of another man. When, indeed, the ceremony of tonsure and other rites of initiation (*Chúdádyá-sanskárá*) are performed (by the adopter), under his own family-name, (then only) can sons given and the rest be considered as issue: else they are termed slaves. Whether he be one whose initiation has been completed, or one whose pupilage (*shoishava*) has passed, on adoption, after the fifth year, the adopter should first perform the sacrifice for male issue." As for what they thus read as from the *Puránas*, that is unauthentic. Were it even authentic, still the interpretations given by some, that,—"One initiated in ceremonies down to that of tonsure, under the family-name of the natural father, bears no filial relation to the adopter; but such relation obtains, where the ceremonies, commencing with that of tonsure, are performed by the adopter only,"—and—"if a child, whose tonsure has been completed (by the natural father,) or one passed five years of age, be adopted, in that case, his filial relation does not accrue,"—are inaccurate. For, a repetition (of the same position, in two sentences of the same passage) would follow;—the generally received rule, as recognised by all good persons, in respect to the filial relation, previous to the investiture of the characteristic thread, of one also adopted under five years of age, (if uninitiated in tonsure by the natural father,) would be invalidated; and the adopter dying at that juncture, incompetency (of the adopted) to perform his obsequies would result.—*Dat. Ch.*, Sect. II, paras. 25, 26. Remark.

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Interpretation On the contrary, this is the meaning of the passage:—"Filial relation (to the adopter) of one initiated down to tonsure, under the family-name of his natural father, being first barred; on the repetition of that ceremony and the rest, such relation is exempted from the prohibition; and accordingly, since previous to the performance of tonsure and the other rites by the adopter, the servile state of one initiated (by his natural father unto that ceremony,) and of him, who has passed his fifth year, is intimated: after the performance of that ceremony and the rest, (by the adopter), filial relation to him is established. In respect to one whose initiation has not been performed (by his natural father), and a child who is under five years of age, this relation is obtained by law alone; and this is notorious.—*Dat. Ch.*, Sect. II, § 27.

Further Interpretation. Or there may be this interpretation.—"A son, (if adopted,) though initiated as far as tonsure by his natural father, is not a son (to such father):"—the author having thus premised such son not to be filially related (to his natural father), the sentence "*anyatas-cha puttratám-yáti*" (meaning "and he acquires filial relation to another") is subjoined as a reason, and thus the objection, that one term "*putra*" (son), and the particle "*cha*," are unmeaning, is obviated.—*Dat. Ch.*, Sect. II, § 28.

"After the fifth year."] This regards a *Bráhmana* seeking the fruit of holiness, resulting from the study of scripture. For, since the fifth year only is the principal season for the investiture of the characteristic thread of one desirous of such holiness, as is shown by this text.—"For a *Bráhmana* desirous of holiness, resulting from the study of scripture, the fifth year," &c., the passage in question has the same foundation. But, for one not so desirous,—"after the eighth year, the adopter, &c."—*Dat. Ch.*, Sect. II, § 30.

Conclusion. And thus, on account of uniformity of import with the text of VASHISHTHA—"Sprung from one following a different *shákhá*, (or branch of the *Vedas*), the given son even, when invested with the characteristic thread, under the family name of the man himself, according to the form prescribed by his peculiar *shákhá*, becomes participant of the duties of such *shákhá*"—by the compound epithet "*Chúdádyá*," in the quality, conveyed by which, the term *Chûdá* is not included, rites commencing with that of investiture, for persons of a regenerated tribe, would be suggested; but for *Shúdras* marriage, and so forth, implied.—*Dat. Ch.*, Sect. II, § 29.

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365. The primary season for tonsure of a *Bráhmana, Kshatriya* or *Voishya* boy is the first or third year of his age; and such season for the *upa-nayana* of a *Bráhmana* is the eighth year, of a *Kshatriya* is the eleventh, and that of a *Voishya* is the twelfth, year of his age, reckoned from the respective dates of their conception.* *Vyavasthá.*

MANU:—"By the command of the *Veda*, the ceremony of tonsure should be legally performed by the *first* three classes in the first or third year *after birth.*—In the eighth year from the conception of a *Bráhmana*, in the eleventh from that of a *Kshatriya*, and in the twelfth from that of a *Voishya*, let the father invest the child with the mark of his class.†—Should a *Bráhmana*, (or *his father for him*,) be desirous of his advancement in sacred knowledge, a *Kshatriya* of extending his power, or a *Voishya* of engaging in mercantile business, the investiture may be made in the fifth, sixth, or eighth year respectively."—Chap. I, *vs.* 35—37. Authority.

There are also secondary seasons for initiation in *upanayana*. Thus MANU:—"The ceremony of investiture hallowed by the *gáyatrí* must not be delayed, in the case of a priest, beyond the sixteenth year; nor, in the case of a soldier beyond the twenty-second, nor in that of a merchant beyond the twenty-fourth.—After that, *all youths of* these three classes, who have not been invested at the proper time, become *Vrátyas* or outcasts, degraded from the *gáyatrí*, and condemned by the virtuous." Consequently,— Authority.

366. A boy, though not initiated in *upa-nayana* in the primary season, may be adopted before *Vyavasthá.*

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* Sir William Macnaghten says:—"The period fixed, however, for the investiture of the three superior tribes are different. That of a *Brahmin* should take place when he is eight years of age, which may be construed optionally, as signifying eight years from the date of conception, or from the date of birth. That of a *Kshatriya* at eleven years of age, and that of a *Voishya* at twelve" (Macn. H. L., Vol. I, pp. 72, 73).—These eight, eleven and twelve years are, however, to be reckoned from the date of conception, as ordained in the text of MANU quoted: it is true those periods are sometimes calculated from the date of birth, but that is according to the family custom, and not according to the law.

† Although in the above text of MANU the primary season for tonsure is ordained to be the first or the third year from the date of a child's birth, yet if it be the custom of a family to perform the ceremony at a later period the same is preferable, custom being the transcendent law and superseding the general maxims of the law.—See *ante*, pages 117—120.

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the close of the secondary season ordained for that ceremony.

Reason. Since after adoption at that time he may be initiated in the *upa-nayana*.

Vyavasthá. **367.** But no boy of the *Brâhmana*, *Kshatriya* or *Voishya* caste should be adopted after his *upa-nayana*, and no *Shúdra* after his marriage: such adoption, if made, is invalid.

Annotations.

366. There are secondary periods allowed: for instance, the investiture of a *Brahmin* may be postponed until sixteen years after the date of conception, that of a *Kshatriya* until twenty-two years after the same date, and that of a *Voishya* until twenty-four years.* Macn. H. L., Vol. I, p. 93.

367. It should be observed, however, that where this ceremony of *upa-nayana* has once been performed, an insurmountable bar to adoption is thereby immediately created. Its effect cannot, as in the case of tonsure before the age of five years, according to the authority of the *Dattaka-mímánsá*, be so far neutralised as to admit of its being re-performed after the ceremony of *Putreshti*.—Macn. H. L., Vol. I, p. 73.

Another question would likewise arise, whether even after the expiration of the secondary season for the celebration of the rite in question, as provided in the case of the natural father, the adopter, by observing certain penances, might not derive ability to perform the rite in question. A determination of these points in the present compilation, could not, without presumption, be attempted. It may, however, be remarked, that it appears more reasonable to suppose that the celebration, in the family of his

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* The author of the Considerations on Hindú Law seems adverse to the extension of the limits. He maintains that, in the case of *Gopee-mohun Deb*, it was the opinion of all the *pandits*, who were consulted on his behalf, that proof of his being under the age of five years was indispensable. He also alludes to a remark appended to the case of *Keerut-narain* versus *Musst. Bhoobunessuree*, decided in the S. D. A. But, with respect to the first, it may be observed, that there does not appear to have been any formal opinion actually taken, and, with respect to the second, it is not apparent on what authority the remark proceeded. The author of the Considerations lays it down as a second rule, that adoption cannot take place in any of the classes after the ceremony of tonsure shall have been performed. From what has preceded, it will appear, however, that 'investiture' should have been substituted for 'tonsure'; and that the doctrine should have been qualified by the provision, that, if tonsure had been performed previously to the fifth year, it might be repeated in the family of the adopting father, the adopted son thereby becoming an *anitya-dwyámushyáyana*.—Macn. H. L., Vol. I, page 75.

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(i) "*Not otherwise disqualified.*"*—That is, not disqualified to be adopted on account of any of the defects, mental or corporal, (such as madness, blindness, idiotism, deafness and dumbness, and so forth,) for each of which a person is disqualified to perform the funeral obsequies and other duties of a son, and to inherit from his father and the rest.† Consequently,—

368. The boy who is free from any such defect or defects, as above, can be adopted as a son, and not otherwise. *Vyavasthá.*

Annotations.

father, of so important a rite as the *upa-nayana*, or the expiration of the secondary period, prescribed for the performance of that ceremony, should constitute an impediment to adoption of a son given, by precluding the capability of the rite referred to, being celebrated in the family-name of the adopter.—Sutherland's Synopsis, Note XII.

This has been doubted by the translator of the *Dattaka-chandrika* and *Dattaka-mímansá*, in his Synopsis, at the conclusion of those works, and he diffidently expresses his inability to settle the question, though he inclines to the negative: but independently of there being no authority in support of the affirmative of the question, the fact that investiture constitutes a second birth is conclusive against it. Adoption is permitted on the principle that the adopted son is born again in the family of his adopting father; but this cannot be where the investiture, which causes the secondary birth, has already been performed in the family of the natural father.—Macn. H. L., Vol. I, page 73, Note.

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* *Ante*, page 312.

† See *ante*, pages 269, 270, 290, 291, and the Chapter on Exclusion from Inheritance.

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SECTION V.

ON DWYÁMUSHYÁYANA OR SON OF TWO FATHERS.

According to all opinions,—

Vyavasthá. **369.** When a son is given by the natural father and received by the adopter with this stipulation—"This is a son to us both," he becomes a *Dwyámushyáyana* (son of two fathers).

Vide Precedents, pages 517, 560, 563, 564.

Authority. Should an agreement subsist, stipulating that the adopted son should be the son of the natural father, and adopter likewise, a special rule for his participating in the family of both, by reason of being a *dwyámushyáyana,* will be declared.—*Dat. Ch.*, Sect. II, § 24.

Authority. Where a mutual agreement between the natural father and adopter exists, [those affiliated] through the adoption of a holy saint, that is, one propounded by a holy saint, are *dwyámushyáyanas.*—*Dat. Ch.*, Sect. II, § 40.

Authority. From gift, preceded by an agreement, such (as that premised), in the case in question even, the common relation (to both fathers) of such given son is established.—*Ibid.*

Remark. It has been determined that the natural mother alone cannot make such an agreement, and give her son to be adopted in the *dwyámushyáyana* form without the consent, and after the death, of her husband.*

Annotations.

369. The son given *(dattaka* or *dattrima)* is of two sorts: 1st, simple; 2nd, son of two fathers *(dwyámushyáyana).* The first is one bestowed without any special compact; the last is one given under an agreement to this effect—"he shall be a son to us both."—*Vyavahára-mayúkha,* Chap. IV, Sect. v, § 21.

369. There is a particular species of adoption termed "*Dwyámushyáyana,*" where the adopted son continues still a member of his own family, and partakes of the estate both of his natural and his adoptive father, and so inheriting is liable for the debts of each.—Macn. H. L., Vol. I, 71.

The same double relation may be the result of agreement, at the time of adoption, between the adopter and him who is willing to give his son for the purpose.—Stra. H. L., Vol. I, p. 86.

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* *Vide* Precedents, page 517.

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The author of the *Dattaka-mímánsá* says :—"If one who has been initiated in the different rites down to tonsure be adopted, he becomes the son of two fathers, for he is initiated under both family names; and that the effect of this is his connection to both families, will be declared in the sequel."—*Dat. Mím.*, Sect. IV, § 32. Remark.

He further says :—"Should a child, directly on being born, be adopted, as his initiation under both family names would be wanting, he would partake only of the family of the adopter."—*Ibid.*, Sect. VI, § 41. Remark.

370. A son given in adoption after the performance of his tonsure in the family of his natural father, becomes a *dwyámushyáyana*, provided there be a stipulation to that effect, but not otherwise. *Vyavasthá.*

The exclusive filial relation to the natural father of the adopted son, whose tonsure has been completed, having been first barred by the conjunction "*and*" in the sentence, "and he acquires filial relation to another," a common relation to the natural and adoptive fathers is obtained, on account of both even having performed initiatory rites; and this must be understood where there may be a stipulation to this effect between the two :—"This is a son to us both,"—and such only is called a "*dwyámushyáyana*," having two fathers (*a*), and belonging to two families.—*Dat. Ch.*, Sect. II, para. 34. Authority.

(*a*) "Having two fathers;"—that is, being a son of both the natural father and the adopter; since they are in common fathers of a *dwyámushyáyana*. Explanation.

371. The adoption of an only son in the *dwyámushyáyana* form is both proper and valid, though it is not so in the form of absolute *dattaka*.* *Vyavasthá.*

Vide Precedents, pages 531—547, 560, 561, 563, 564.

The prohibition—"let not a man give an only son"—refers to an adopted son other than the *dwyámushyáyana*, or the son of both fathers; for, (where the adopted son is such,) no extinction of lineage ensues, as has already been declared. —*Dat. Ch.*, Sect. III, § 17. Authority.

The *dwyámushyáyanas* are of two descriptions—*Nitya-dwyámushyáyana* or absolutely son of two fathers, and *Anitya-dwyámushyáyana* or incompletely son of two fathers.

* See *ante*, pages 267, 312—315.

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Vyávasthá. **372.** He is a *nitya* or absolute *dwyámushyáyana* who is given in adoption with this stipulation—"this is a son to us both, the natural and the adopting fathers."

Vyavasthá. **373.** An *anitya* (incomplete) *dwyámushyáyana* is he who is initiated by his natural father, in rites ending with that of tonsure, and by the adoptive father, in those commencing with the investiture of the characteristic thread.

Authority. Sons given and the rest [who are sons of two fathers] are of two descriptions: Those absolutely sons of two fathers, and those incompletely so. Of these, those are named "absolute *dwyámushyáyanas*" who are given in adoption, with this stipulation,—this is the son of us two (the natural father and the adopter)." The incomplete *dwyámushyáyanas* are those, who are initiated by their natural father, in ceremonies ending with that of tonsure, and by the adoptive father, in those commencing with the investiture of the characteristic thread; since they are initiated under the family names of both even, they are the sons of two fathers; but incompletely so. Should a child directly on being born, be adopted; as his initiation under both family names, would be wanting, he would partake only of the family of the adopter.—*Dat. Mím.*, Sect. VI, para. 41.

Conclusion. The conclusion therefore is, that—

Vyavasthá. **374.** The son adopted *before* his tonsure, with the above stipulation, by one of the same or a different general family (*gotra,*) is a *nitya-dwyá-mushyáyana* (absolutely son of two fathers) ;—the

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Annotations.

372. An only son cannot become an absolutely adopted son (*shuddha-dattaka*), but he may be affiliated as a *dwyámushyáyana*, or a son of two fathers. In this case, the reason of the prohibition, *viz.*, extinction of lineage to the natural father, would not apply. An only son of a whole brother accordingly, if no other nephew exist for selection, must be adopted by his uncle requiring male issue, and is son of two fathers.—Sutherland's Synopsis, Head Second, § 4.

To this form of adoption the prohibition as to the gift of an only son does not apply.—Macn. H. L., Vol. I, p. 71.

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son received in adoption *after* his tonsure with the above stipulation, is also a *nitya-dwyámushyáyana* if adopted by one of the same *gotra*, and an *anitya-dwyámushyáyana* if adopted by a person of a different *gotra* with stipulation as above.—The connection of the adopter with an *anitya-dwyámushyáyana* son lasts only during the life of such son, but does not extend to his children.

Because, the connection between an *anitya-dwyámushyáyana* and his adopter ceases to exist after the death of the former. Reason.

Intending all this, SATYÁSHÁDHA says,—"Of absolute *dwyámushyáyanas* of both, &c."—By this compendious rule, having declared the connection of absolute *dwyámushyáyana* to the patriarchal saints in both families, the author by another aphorism, commencing—"Of sons given, and the rest like the *dwyámushyáyanas*, &c."—ordains the same connection with respect to those incompletely *dwyámushyáyanas*. Now, this is thus explained by SAVARA-SWÁMÍ. "Treating on *dwyámushyáyanas*, the author mentions those incompletely so, 'of sons given,' &c. Unto those only, not to issue beyond, (does the connection to both families extend). By the first only, the initiatory rites (ending with tonsure are performed). If by the adopter, (the family of the adopted,) is that of the latter, on account of priority. From this alone (the same is the case,) in respect to a descendant beyond. So also those, who are affiliated by the descendant of the same general family, (as for instance, a nephew, by an uncle,) are of the adopter's family only."—*Dat. Mím.*, Sect. VI, § 42. Authority.

The meaning of this explanatory passage is this:—He only is connected to both families, who has been initiated under both family names; not descendants beyond. In reply to the question, as to the cause of connection to the family Explanation.

Annotations.

373, 374. It may take place either by special agreement, that the boy shall continue as the son of both fathers, when the son adopted is termed "*Nitya-dwyámushyáyana*;" or otherwise, when the ceremony of tonsure may have been performed in his natural family, when he is designated "*Anitya-dwyámushyáyana*;" and in this latter case the connection between the adopting and the adopted parties endures only during the life-time of the adopted. His children revert to their natural family.—Macn. H. L., Vol. I, p. 71.

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of the natural father, the author says: "By the first, &c." "The first,"—that is, the natural father: (the cause is,)—on account of the initiatory rites being performed by him only.—Now the initiatory rites, (alluded to,) are those ending with tonsure: on account of this passage from the *Káliká-purána*—"O Lord of the earth, a son having been regularly initiated, under the family name of his (natural) father, unto the ceremonies of tonsure inclusive, does not become the son of another man." This has been already before explained. He does not become exclusively the son of another, but, is the *dwyámushyáyana*, or the son of two fathers. Anticipating a question, as to what would be the case, were the initiation performed by the first; the author adds,—"If by the adopter, &c." If every initiatory rite from that on birth or even those commencing with tonsure, be performed by the adopter only, the family (of the adopted) is of the latter,—that is, of the adopter only. For this, a reason is subjoined:—"on account of priority"—meaning—from precedence in the performance of initiation. The author declares, the family (required to be known,) in the instance of the issue of the *dwyámushgáyana*, and that of the (absolutely) adopted son:—"from this alone"—from the initiation taking place under the family name only of the adopter in both instances even his, is the family of the descendants beyond.—*Dat. Mím.*, Sect. VI, § 43, 44, 45.

Authority. Treating on absolute *dwyámushyáyanas*, the author mentions those incompletely so,—'Of sons given, and the rest, &c.'—'Unto these only, not to issue beyond, (does the connection of both families extend). If the initiatory rites are performed by the first only, (the family is his): but if by the adopter, that of the latter; on account of priority. Through him only, in the case of descendants beyond (the family is determined). The intent of this explanatory passage is this:—As in the case of the son of the wife, should there be an agreement between the two, the adopted son participates in the families of both: otherwise, where the whole of the initiatory rites have been performed by the natural father only, he shares the family of such father; but in the case of the initiation being performed by the adopter, in that of the latter, that of the adopter, on account of priority,—meaning superiority. Through him only, in the case of descendants beyond, the family is determined.—*Dat. Ch.*, Sect. II, § 37, 38.

Vyavasthá. **375.** One boy, who is not a brother's son, can be adopted, whether as an absolute *dattaka* or as a *dwyámushyáyana*, only by one man,—not by two or more.

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"By a man destitute of a son."*—From the singular number being here used, it follows that the same son must not be adopted by two or three persons. But would not the law, as to the son given, and the rest, being *dwyámushyáyanas*, (or sons of two fathers,) be thus contradicted? It is not so; for, the state as son of two fathers imports both a natural and an adoptive father, and the prohibition regards two adoptive fathers. Thus there is no contradiction.—*Dat. Mím.*, Sect. I, § 30—32. Authority.

376. A whole brother's son may, however, be adopted in the *dwyámushyáyana* form by one or more uncles. *Vyavastká.*

Annotations.

376. The same person cannot be adopted by more than one individual, except in the case of one nephew, by several uncles, the whole brothers of his natural father. It may, however, be inferred that a legal impediment would exist, to the affiliation by an uncle, whom his father had given away in adoption, as a *Shuddha-dattaka*, who retains no filial relation to his natural father.—Sutherland's Synopsis, Head Second, § 4.

Thus, though a youth may in this way have two fathers, he cannot have two adoptive ones; since the same son cannot be adopted by more persons than one, excepting as between a nephew and several uncles; nor, in this case, is it clear that it can be always practicable.—Stra. H. L., Vol. I, p. 86.

Sir William Macnaghten says—"Two persons cannot join in the adoption of one son. A notion seems to have prevailed that two brothers might adopt the same individual; but this is entirely erroneous. The supposition seems to have proceeded on a misconstruction of the following text of MANU:—'If, among several brothers of the whole blood, one have a son born, MANU pronounces them all fathers of a male child by means of that son.' But that text is not meant to authorise the adoption of a nephew even by two or more brothers. The adopted son of one brother would of course offer up oblations to the ancestors of all, and so far would perform the office of a son to them also; but he would not take the estate of his adopting father's brothers, in the event of their having any nearer heir." (Macn. H. L., Vol. I., p. 77.) And for authority he refers to the following passages of his father's "Considerations on the Hindú Law." "In page 136, I have expressed myself as follows:—'From what has been already said, I conclude that *two*

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* *Ante*, page 269.

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Authority. As (the term) "they" is a compound formed by the retention of one term and the omission of others, being resolvable into the phrase "he and they (*dual and plural*);" at the desire of one, two or more (brothers), for male issue, the affiliation of a brother's son takes place. 'By means of that.']—By him even, by whom the natural parent becomes the father of male issue, do all the brothers also become so.—*Dat. Mím.*, Sect. II, § 43, 44. See *ante*, page 267.

Remark. There is another kind of *dwyámushyáyana*, which is by appointment and procreation, and not by adoption. Thus YÁJNAVALKYA :—"A son begotten by one, who has no male

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Annotations.

men could not, at any time, have *adopted the same son.*' In the year 1821, Sir Edmund Stanley, Chief Justice of Madras, applied to me to procure for him the opinions of *pandits*. The case was as follows: There were two Hindú brothers who had joined in an adoption of the same son. Neither of the brothers had male issue, but the elder one had a daughter. This daughter married the son who had been so adopted; and her father (after the adoption and marriage of his daughter) took a wife, by whom he had a son. The adopted son was said by some to have been, when taken in adoption, fifteen, by others he was said to have been twenty years of age. The contest in the Supreme Court at Madras was between the adopted son and the son who had been begotten afterwards. I consulted the Supreme Court *pandits* personally, and received the following information: Two *men*, whether brothers or not, cannot adopt the *same* boy as a son. In the absence of my son from Calcutta, Mr. Courtenay Smith, a Judge of the Sudder Dewany Adawlut, was so good as to obtain for me, from the *pandits* of the Court, their answers to the following questions: *Question* first.—Can two Hindú brothers, A & B, adopt the same person (C) as a son? *Answer.*—They cannot, any more than two persons can marry the same girl."—Cons. H. L., pp. 473—476.

The result of all this is, that two or more persons (whether brothers or not), cannot adopt absolutely one and the same son, be he the son of a brother or any other person; but there is no prohibition as to two or more brothers adopting in the *dwyámushyáyana* form one and the same son of another brother. On the contrary, such adoption seems to have been allowed by law, as is manifest from the passage of the *Dattaka-mímánsá*, above quoted. Hence, although two or more persons cannot absolutely adopt a brother's son, yet they can adopt him in the *dwyámushyáyana* form.

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issue, on the wife of another man under a legal appointment, is lawfully heir and giver of funeral oblations to both fathers."—*Mit.* Inh., Chap. I, Sect. X, § 1.

Explanation.

The meaning of this is as follows.—If the husband's brother, or other person, duly authorized, and being himself destitute of male issue, proceed to an intercourse with the wife of a childless man, for the sake of raising issue both for himself and for the other, the son, whom he so begets, is the child of two fathers, and denominated '*Dwyámushyáyana.*" He is heir to both, and offers funeral oblations to their *manes.*—*Ibid.*, § 3.

Remark.

The above is one of the subsidiary sons, and is etymologically termed "*Kshetraja*" (son of the field or wife).* But in the present (*Kali*) age, it is forbidden to raise such issue in consequence of the prohibition against the appointment as above mentioned. Thus VIJNÁNESHWARA: "It is expressly declared—'As the duty of an appointment [to raise up seed to another], and as the slaying of a cow for a victim, are disused, so is partition with deductions, (in favor of elder brothers)."† So also NANDA PANDITA:—"Nor is it to be argued from this that, in the *Kali* age, there may be the son of the wife (technically so called); for such is forbidden by the mere prohibition against the appointment in that age (of a wife to raise issue to her husband by another)."‡

SECTION VI.

FORMS OR MODES, &C., OF ADOPTION.

The form or mode of adoption propounded by SHOUNAKA.

On this subject SHOUNAKA has said—"I, SHOUNAKA, now declare the best adoption (*a*): One having no male issue, or one whose male issue has died, having fasted for a son (*b*); having given two pieces of cloth, a pair of ear-rings, a turban, a ring for the fore-finger, to a priest religiously disposed, a follower of VISHNU, and thoroughly read in the *Vedas*; having venerated the king (*c*) and virtuous *Bráhmanas* by a *Madhu-parka* (prepared food consisting of honey, liquid butter and curds); both a bunch of sixty-four stems, entirely of the *Kusha* grass, and fuel of the *Palása* tree also; having collected these articles, having earnestly invited kinsmen and relations (*d*); having entertained the kinsmen with food, and especially *Bráhmanas* (*e*); having performed the rites, commencing with that of placing the

* See *ante*, pages 274, 275 † *Mit.* Inh., Chap. I, Sect. iii, § 5.
‡ *Dat. Mím.*, Sect. I, § 66.

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consecrated fire, and ending with that of purifying the liquid butter; having advanced before the giver, let him cause to be asked thus,—'give the boy' (*f*). The giver, being capable of the gift, (should give) to him (*g*), with recitation of the five prayers (*mantras*), the initial words of the first of which are,—'*Yo-yajnena,*' &c.; having taken him by both hands, with the recitation of the prayer, commencing '*Devasya-twá,*' &c.; having inaudibly repeated the mystical invocation '*Angádangát,*' &c.; having kissed the forehead of the child; having adorned with clothes, and so forth, the boy, bearing the reflection of a son (*h*); the mutual relation between a couple, being analogous to the one, being the father or mother of the other, connection is forbidden; as for instance, the daughter of the wife's sister, and the sister of the paternal uncle's wife (*i*). Accompanied with dancing, songs and benedictory words; having seated him in the middle of his house; having, according to ordinance, offered a burnt offering of milk and curds (to each incantation), with recitation of the mystical invocation '*Yastwá hrida*': the portion of the *Rik-veda*, commencing,—'*Tubhyam-agne*:' and the five prayers of which the initial words of the first are '*Somodadat,* &c.' (*j*).—Let the best of the regenerate, to the extent of his ability, bestow a gratuity on the officiating priest. A king, half even of his dominion (*k*): next in order, a *Vaishya*, three hundred pieces (*l*). A *Shúdra*, the whole even of his property (*m*):* if indigent, to the extent of his means."*—*Dat. Mím.*, Sect. V, § 2, 4, 8, 10, 11, 13, 15, 19, 21, 25, 27, 29.—*Dat. Ch.*, Sect. II, § 1—9, 14.

Explanation. (*a*) *Adoption.*] The form of adoption.—*Dat. Mím.*, Sect. V, para. 3. *Dat. Ch.*, Sect. II, para. 2.

Explanation. (*b*) *Having fasted.*] Having observed a fast on the day preceding that of adoption.—*Dat. Mím.*, Sect. V, para. 3. *Dat. Ch.*, Sect. II, § 2.

Explanation. (*c*) The king here signifies "the chief of the village," for a text of *Vriddha* GOUTAMA recites—"Having invited all kinsmen, and the chief of the village also."—*Dat. Mím.*, Sect. II, § 5.

Explanation. (*d*) '*Kinsmen* (bandhún)'—His own, his father's and mother's kinsmen. '*Relations* (*jnátín*)'—*Sapindas.* The invitation of kinsmen and the others is for the sake of their witnessing; in the same manner, as the invitation of the king: for, both terms are confirmatory of this,† in the sense,—they unite with (*ba-*

* See the Precedents and Remarks at pp. 570—574, *et seq.*

† *For, both terms are confirmatory of this, &c.*] Both terms, *viz.*, '*Bandhún*' (kinsmen) and '*jnátín*' relations. '*Bandhu*' and '*jnáti*' of which, these terms are severally the accusative case plural, are derivatives of the roots '*badha*' (bind) and '*jná*' (know.)—Note by the Translator.

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dhnanti), and know *(jánánti)*, as their own, the adopted person. *Dat. Ch.*, Sect. II, para. 9.

(e) Having entertained the kinsmen with food, and especially Brâhmanas.] The meaning of this is,—having entertained invited kinsmen and *Brâhmanas* previously appointed, and on account of the conjunction 'and,' (§ 8) invited relations.—*Ibid.*, § 10. Explanation.

The inviting these is for the sake of witnessing.—*Dat. Ch.*, Sect. II, para. 6.

(f) The meaning is,—let him cause a demand to be made through *Brâhmanas*, previously appointed.—*Dat. Mím.*, Sect. V, para. 12. Explanation.

(g) The capacity to give consists in having a plurality of sons, and the assent of the wife, and so forth "should give" is understood before this part:—"With the recitation of the five prayers;" for, gift is indicated in the prayer commencing—"Let him receive a male from an intelligent person."—*Dat. Mím.*, Sect. V, para. 14. Explanation.

(h) The reflection of a son.] The resemblance of a son; and that is the capacity to have sprung from [the adopter] himself, through an appointment [to raise issue on another's wife], and so forth; as [is the case] of the son of a brother, a near or distant kinsman, and so forth.—*Ibid.*, § 16. Explanation.

(h) Reflection of a son.] The resemblance of a son, or in other words, the capacity to have been begotten by the adopter, through appointment and so forth.—*Dat. Ch.*, Sect. II, § 8. Explanation.

Accordingly, the brother, paternal and maternal uncles, the daughter's son and that of the sister, are excluded; for they bear not resemblance to a son.—*Dat. Mím.*, Sect. V, para. 17. Exposition.

(i) The meaning of the text is this: Where the relation of the couple, that is, of the bride and bridegroom, bears analogy to that of father or mother, if the bridegroom be, as it were, father of the bride, or the bride stand in the light of the mother, to the bridegroom, such a marriage is a prohibited connection.—*Ibid.*, § 19. Exposition.

(j) The meaning is: With such seven incantations having offered seven burnt offerings of milk and curds.—*Ibid.*, § 22. Explanation.

(k) Half even of his dominion.] The produce for one year of his dominion; for a text of *Vriddha* GOUTAMA recites,—"Let him proffer the profit arising from half of his dominion received in one year. And, this is in respect of one of the royal tribe.—*Ibid.*, § 28. Exposition.

(l) Pieces.] Three hundred stamped coins *(nánaka)*, and this must be understood to mean of gold, silver or copper, with Exposition.

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reference to the estate of the individual, being superior, middling or inferior, respectively; on account of the text of *Vriddha* GOUTAMA :—"Let him proffer three hundred pieces in gold, or in silver, or in copper, according as his condition may be superior or otherwise."—*Dat. Mím.*, Sect. V, para. 28.

(m) The whole of his property. That is, the amount earned by the labor of one year: for the expression.—"Received in one year,"* is not special, and there is this prohibition: "If offspring exist, the whole of the property must not be given." *Ibid.*, para. 30.

Form or mode of adoption propounded by *Vriddha* GOUTAMA.

Vriddha GOUTAMA propounds a special rule :—"Let him then cause to be offered, as burnt offerings, a hundred oblations of milk, with liquid butter, contemplating in his mind, as the object, the lord of created beings, with recitation of the prayer—'*Prajápate Natwadetám*, &c.'"—*Dat. Mím.*, Sect. V, para. 23.—*Dat. Ch.*, Sect. II, para 10.

Form or mode of adoption propounded by VASHISHTHA.

VASHISHTHA propounds another mode :—"A person, being about to adopt a son, should take an unremote kinsman,† or the near relation of a kinsman; having convened his kindred and announced his intention to the king(*n*), and having offered a burnt offering, with recitation of the prayers (*o*) denominated '*Vyáhriti*,' in the middle of his dwelling (*n*)." *Dat. Mím.*, Sect. V, § 31.— *Dat. Ch.*, Sect. II, § 11.

Explanation.

(n) "*Kindred*".] The kindred of himself, his father and mother. "The king."] The chief of the village. "Dwelling."] His house.—*Dat. Mím.*, Sect. V, § 33.

Explanation.

(*o*) 'With recitation of prayers, &c.'] On conclusion of the '*ájya-bhága*' sacraments, having offered with fire, four oblations with recitation of the prayers, denominated '*Vyáhriti*' severally and collectively. Such is the meaning.—*Ibid.*, § 34.

Form or mode of adoption propounded by BOUDHÁYANA.

BOUDHÁYANA propounds a particular rule for the followers of the *Toittiri* portion of the *Vedas* :—"We are about to explain the mode for the adoption of a son,—'One about to adopt, produces two pieces of cloth, a pair of ear-rings, a ring, a priest thoroughly read in the *Vedas*, a bunch of sixty-four stems of the *kusha* grass, and fuel of the *Parna*‡ tree. Then having invited kinsmen (*p*) into the middle of the dwelling, and having made a representation to the king (*q*); having sat down by the direction of a *Bráhmana* (*r*), in the assembly, or in the middle of his house; having caused to be exclaimed,—'Auspicious day! benediction! prosperity!; having performed the rites, commencing with the

* Occurring in the passage of *Vriddha* GOUTAMA, cited in the preceding page.

† This has been explained. See *Dat. Mím.* Sect. II, § 16 : *ante*, page 324.

‡ *Butea frondosa.*

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recitation of the prayer—'*Yad-deva-yajana*', down to the placing of the vessels for water; having advanced before the giver, let him thus beg: 'Give me this son.' The other replies, 'I give.' He receives the child (and says), 'I receive thee, for the sake of religious duty: I adopt thee for offspring.' Then having adorned him with clothes, and ear-rings, and ring: having performed the investiture and other ceremonials down to the kindling of a flame of fire; having dressed the oblations, he offers a burnt offering. After having recited the incantation in the first chapter of the (*Yajur*) *Veda*, commencing,—'*Yastwá hridá-kíriná manyamánh*'—with the recitation of the sacrificial prayer, '*Yasmai twam sukrite játaveda*,' &c.,—he offers a burnt offering. Next, having performed the burnt sacraments, where the prayers denominated '*Vyáhriti*' are recited: and that designated '*Swishti-krit*,' with other ceremonials, being completed, down to the bestowing of an excellent cow, he presents the fee [saying, yours are] these two cloths, the ear-rings, and the ring, likewise."—*Dat. Mím.*, Sect. V, § 42.—*Dat. Ch.*, Sect. II, § 16.

(*p*) "*Kinsmen.*"] The kinsmen of the father and mother. "Relations."]—*Sapindas.* The inviting of these is for the sake of witnessing.—*Dat. Ch.*, Sect. II, § 6. Explanation.

(*q*) "The king" here signifies the chief of the village, for the text of *Vriddha* GOUTAMA recites,—"Having invited all kinsmen and the chief of the village also."—*Dat. Mím.*, Sect. V, § 5. Explanation.

"If the king be at a distance, (he should thus venerate) the chief of the village,—for a text recites,—"Having united all kinsmen, and the chief of the village also."—*Dat. Ch.*, Sect. II, para. 4. Exposition.

(*r*) *Bráhmanas.*] The plurality meant by this word, is restricted to three.—The venerating of *Bráhmanas* with a view to their asking (the child in adoption).—*Ibid.* Explanation.

Of the forms or modes of adoption above given, the one propounded by VASHISHTHA has been cited in the *Mitákshará*, *Víra-mitrodaya* and other works, besides those solely on adoption.(1) Remark.

Annotations.

(1) Regarding the mode of adoption, a text of VASHISHTHA is usually cited. This enjoins, that, the party proceeding to adopt, should previously give notice to the ruling power (*Rájá*), and after having invited kinsmen, should complete the adoption, by the observance of the prescribed solemnities, *viz.*, a burnt sacrifice, and

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The subjoined form or mode of adoption, deduced from the texts of the sages, as well as from Commentaries and Digests of writers of great eminence, more especially from the *Dattaka-dídhiti*, and appended to the Commentaries on the *Dattaka-mímánsá* and *Dattaka-chandriká*, is generally in use :—

The form or mode of adoption generally in use.

The adopter, having fasted on the day previous to that of adoption, and on the following day having performed the daily religious duties, and put on (two) rings wrought in *Kusha* (1) grass, performed the *Áchamana* (2), invoked VISHNU (3) by uttering his name, worshipped NÁRAYÁNA (4), with perfume and flowers, and uttered the word "*Swasti*" (5), shall three times repeat, in the hearing of the persons attending the ceremony, these words :—"Say ye, (this is) an auspicious day for this act of adopting a son to be performed.

Then having uttered "*Swasti*" and '*Riddhi*,' (prosperity) and repeated "*Swasti na Indrah*," &c., he must make the *Sankalpa*, (6) ;—"To-day of such and such a month and

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Annotations.

the recitation of the prescribed prayers. The forms propounded at greater length, by SHOUNAKA, *Vriddha* GOUTAMA, BOUDHÁYANA and other primitive writers, essentially conform with this of VASHISHTHA. The former provide for the attendance of *Bráhmanas*, and an officiating priest to demand the son to be given.—The expression '*Rájá*' has been explained by commentators to signify the chief of the town or village. They seem however agreed, that, the notice enjoined, and the invitation of kinsmen, are no legal essentials to the validity of the adoption, being merely intended to give greater publicity to the act, and to obviate litigation, and doubt, regarding the right of succession.—Sutherland's Synopsis, Head Third.

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1. A species of grass (*Poacynosuroides,*) held so sacred by the Hindús that their hands are thought to be pure while they touch some of it, and no religious rite is perfect without it.

2. The act of washing the mouth by repeating a *mantra* as a religious ceremony.

3. The second deity in the trinity of the *Hindús*, whose function it is to preserve the universe.

4. The name of VISHNU considered as the deity who existed before all worlds and moved on the waters of creation.

5. A benedictory term,—May good attend you ! Amen !

6. A resolution to perform a religious ceremony ; a religious vow.

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lunar date, I, Srí (proper name) *Deva-sharmá* (7), of such and such *gotra* (8), by reason of being destitute of issue (male), as well as to propitiate Almighty God by liquidating the debts due to ancestors, also to be delivered from the hell (called) '*Put*' (9), and also to continue my own lineage, will receive a son in adoption according to the ordinances of the holy sages MANU, VRIHASPATI, VASHISHTHA, SHOUNAKA, PARÁSARA, and the rest, and according to the branch of the *Veda* which I follow." Having made this *Sankalpa*, and worshipped the *Guru* (spiritual guide), he shall constitute *Bráhmanas*, his representatives, to officiate in the ceremony.

Next the *Bráhmana* constituted as *Áchárryya*, having purified the altar with five *Gavyas* (10), removed the impediments, and purified himself, shall properly place the *ghatas* (earthen vessels full of water), and according to his ability worship GANESHA (11), and the rest, the planets, and *Dikpálas* (12), PRAJÁPATI, and VISHNU, and having placed (consecrated) the fire, and made the *Charu* (13), according to his branch of the *Veda*, he shall place (the latter) at his left side.

After that, the adopter, inviting his friends and relations, representing to the sovereign (14), and going before the giver in the assembly, shall ask thus :—"Give the son." The giver, having repeated five *mantras* (15)—"*Yo-yajnena*," &c., shall say, "I give," and shall give the boy. And the adopter repeating the *mantra*—"*Devasya twá*" &c.,—shall hold him by both hands, and say : "I receive (adopt) thee for religious duty ; I receive thee for progeny ;" and shall once repeat this :—"Sprung from the several limbs, especially from the breast, thou, my soul, art called *son*, mayest thou live for a hundred years !"

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7. The general surname or title of *Bráhmanas* is "*Deva-sharmá*" or "*Sharmá* ;" that of *Kshatriyas* is "*Barmá*," and that of *Voishyas* and *Shúdras* is "*Dásu*."

8. See *ante*, page 174, 175. 9. See *ante*, page 16.

10. *Gavya* is the produce of a cow *(go)* :—the five *gavyas* are milk, curds, *ghee* or clarified butter, cow-dung, and the urine of a cow.

11. GANESHA is the son of SHIVA and DURGÁ : he is the God of wisdom and remover of obstacles, and is invoked by the Hindús at the commencement of each undertaking. By the term 'and the rest' is meant the class of gods, five in number, of whom GANESHA is the head.

12. The gods who superintend the quarters of the universe : there are eight of them, *viz.*, one at each of the cardinal points, and four at the intermediate ones.

13. An oblation of vegetable food, confined, however, to barley, sesamum, *moog* (*Phaseolus mungo*), and principally to rice boiled in milk and clarified butter.

14. See the text of VASHISHTHA and the interpretation thereof, page 350.

15. *Mantra*—a text of the *Veda*, *purána* or *tantra*, a mystical verse or incantation, a form of prayer, a formula sacred to any particular deity.

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Next, the adopter having offered a burnt-offering with these three *mantras* of the *Rig-veda*:—1, "*Yas-twá hridá,*" &c.; 2, "*Tubhyam-agne,*" &c.; 3, "*Somo-dadat,*" &c.; shall repeat them five times.

After that, the giver shall repeat this *mantra*:—"Sprung from the several limbs, mayest thou live for a hundred years: belonging to a different *gotra*, do thou be good to me and to thyself." Next he shall say to the adopter:—"Having legally received the son given by me according to the sacred law, support thou him as thy *ourasa*,* according to justice and the ordinance of the law."

The adopter then, having repeated this (*mantra*):—"I anxiously receive thee, as I ought according to the tenets of religion, for religious duty, for progeny, for the preservation of my race: having ceased to belong to the *gotra* of thy natural father, thou belongest to my *gotra*: may good attend thee, mayest thou be always happy, and live long!"—shall smell the head of the child.

Next, having adorned the son with apparel, ear-rings, &c., the adopter shall deliver him up to his wife, if he have one.

After that, the adopter, having advanced with the son to the *Áchárryya*, shall seat himself before the fire facing the south. And the *Áchárryya* with the *charu* already prepared and kept ready, shall offer a hundred *homas*† to PRAJÁPATI by repeating the *mantra* "*Prajápate,*" &c., and having finished the *charu-homa*, he shall perform the *mahá-vyáhriti-homa*, and the *homa* to the creator of the universe.

Next, he shall perform with *Udumbara*‡ *Samidh*,§ a *homa* to VISHNU, and the *Tilájya-homa* to the deities worshipped.

After that, the act of (adopting) being completed by the performance of the rites commencing with *Shátyáyana* (*homa*) and ending with the singing (called) '*Váma-devya*,' and the *Tilaka*,‖ the act of giving remuneration (*dakshiná*) shall be performed.

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* See *ante*, pages 15 and 16.

† *Homa*, an oblation to fire, a burnt offering or sacrifice.

‡ A wild fig, *Ficus glomerata*. § Sacrificial fuel.

‖ A mark (on the forehead), made with the ash attached to *Sruva* (ash-rake).

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377. Of the ceremonies of adoption, the gift, acceptance and oblation to fire (*homa*), are essentially necessary, without which the filial relation is not produced. *Vyavasthá.*

Vide Precedents, page 565—570, *et seq.*

It is therefore established that the filial relation of adopted sons is occasioned only by the (proper) ceremonies. Of gift, acceptance, a burnt sacrament (*homa*), and so forth, should any be wanting, the filial relation even fails.—*Dat. Mím.*, Sect. V, § 56. Authority.

The same author (MANU) propounds a special rule, should the due form for adoption not be observed:—"He who adopts a son without observing the rules ordained should make him a participator of the rights of marriage; not a sharer of the wealth." The meaning is, the marriage only of one adopted, without the form for adoption, is to be performed; no wealth is to be bestowed on him: on the contrary, in such case, the wife and the rest even succeed to the estate: for, without the observance of form, his filial relation is not produced.—*Dat. Mím.*, Sect. V, § 45, 46. Authority.

In case no form, as propounded, should be observed, it will be declared* that the adopted son is entitled to assets, sufficient for his marriage.—*Dat. Ch.*, Sect. II, § 17. Authority.

378. The non-observance of any of the unessential ceremonies,—such as representation to the king (*Rájá*), invitation of friends or kinsmen, and so forth,—does not, however, render the adoption incomplete or invalid.† *Vyavasthá.*

Annotations.

377. Should a son be adopted without the observance of the prescribed form, his filial relation would not be established, but he would be entitled to assets sufficient to defray the expense of his marriage.—Sutherland's Synopsis, Head Third.

378. The expression '*Rájá*' has been explained by commentators to signify the chief of the town or village. They seem, however, agreed, that the notice enjoined and the invitation of kinsmen are no legal essentials to the validity of the adoption, being merely

* In Section VI, § 3.

† See *ante*, page 348.

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Authority. JAGAN-NÁTHA :—" He who means to adopt a son must assemble his kinsmen," &c. This is intended to show that a son known by kinsmen (to have been adopted,) shall take the inheritance and perform the *shráddha* and the like; and they shall not molest him. The notice given to the king is intended for the same purpose.—*Coleb.* Dig., Vol. III, page 244.

Authority. Notice to the king and convocation of kinsmen are necessary for a seen (or secular) purpose, namely, that the adopter's brothers and the rest may know the name and class (of the child), and so forth, after thoroughly investigating (all circumstances). For this reason (the purpose not being indispensable), affiliation is in some instances valid, even without this *unessential* part (of the ceremony).—*Ibid.*, p. 248.

Remark. JAGAN-NÁTHA says also this :—"The *(homa* or) oblation to fire with holy words from the *Veda* is *an unessential* part of the ceremony: even though it be defective, the adoption is nevertheless valid; for no one admits that the principal object is unattained if an unessential part be defective."—"In like manner, should the oblation to fire be partly omitted in consequence of inability (to complete it), the adoption is sometimes good in law, as marriage and the like are valid in similar circumstances."—"If the declared intention be expressed in these words, 'I give him to you as a son,' and if the accepter's intention be thus expressed, 'I take him as a son,' he becomes a son: nothing else is required.' Since no one has declared that filiation is null, if the oblation to fire with holy words from the *Veda* be omitted, the validity of adoption, by gift and acceptance only, without such an oblation, is fully proved by reasoning."—See *Coleb.* Dig., Vol. III, p. 244—248.

Annotations.

intended to give greater publicity to the act and to obviate litigation and doubt regarding the right of succession.—Sutherland's Synopsis, Head Third.

Most of these rules are general; they are not all imperative. The notice to the king may be dispensed with.—Colebrooke's Remarks. See Stra. H. L., Vol. II, p. 64.

As to notice to the *Rájá* and invitation of kinsmen, they are agreed not to be absolutely necessary, being merely intended to give greater notoriety to the thing, so as to obviate doubt regarding the right of succession.—Stra. H. L., Vol. I, p. 83.

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Mr. Colebrooke remarks:—"As to oblation to fire, the ceremony is prescribed; but the fact of its celebration may be presumed if there be no proof to the contrary." Then he relies upon the following dictum of JAGAN-NÁTHA:—"The inadvertent omission of a ceremony would not invalidate the adoption." Again, amongst his remarks accompanying his letter to Sir Thomas Strange, the learned writer observes that 'the unintentional omission of some part of them by the adopter would hardly invalidate adoption, though the wilful omission of the whole by him might have that effect; since the performance of the ceremony of tonsure or other rite in the family of the adopter is indispensable to the completion of the adoption.'—See Stra. H. L., Vol. II, pp. 106 and 130.

Sir Thomas Strange, on the authority of JAGAN-NÁTHA, Messrs. Colebrooke, Sutherland, and Ellis, observes: "There must be *gift* and *acceptance* manifested by some overt act. Beyond this, legally speaking, it does not appear that any thing is absolutely necessary. And even with regard to the sacrifice to fire, important as it may be deemed in a spiritual point of view, it is so with regard to a *Bráhmana* only: according to the constant distinction in the texts and glosses, upon matters of ritual observance, between *Bráhmanas* and other classes; it being by the former only that the *Datta-homa*, with holy texts from the *Veda*, can properly be performed. The other classes, and particularly the *Shúdra*, upon this and other like occasions, perform an imitation of it, with texts from the *Puránas*. And, even with regard to the *Bráhmanas*, admitting their conception in favor of its spiritual benefit, it by no means follows that it is essential to the efficacy of the rite for civil purposes, but the contrary is to be inferred; and the conclusion is, that its validity, for these, consists generally in the consent of the necessary parties, the adopter having at the time no male issue, and the child to be received being within the legal age, and not being either an only, or the eldest, son of the giver, the prescribed ceremonies not being essential."*—Stra. H. L., Vol. I, pp. 95, 96.

JAGAN-NÁTHA'S opinion refuted.

The first part of JAGAN-NÁTHA'S opinion, namely,—"that the oblation to fire *(homa)* is an unessential part of the ceremony of adoption"—appears to be inaccurate. In the first place, it is to be seen whether or not adoption is *essentially* a religious act; if religious, it could not take place without the performance of the religious rites prescribed for the same, more specially the *homa* or oblation to fire, which is one of the three essentials of adoption. That adoption in general (whence a *Shúdra's* adoption also) is essentially a religious act has not only been ordained by our legislators and authors of Commentaries and Digests, but has also been acknowledged by the highest judicial authorities,

* But see *ante*, pages 347—351 and especially page 355.

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as will be evident from the annexed foot notes.* Further, when it is explicitly laid down in the *Dattaka-mímánsá* and other works of paramount authority, that the filial relation of a boy adopted without the observance of the *homa* and other rites fails to accrue, and the boy so adopted does not inherit the adopter's property, then the *homa* and other necessary rites cannot, upon the mere saying of JAGAN-NÁTHA, a modern compiler (whose compilation has been justly characterised as the best law book for counsel and the worst for a judge,)† be unessential parts of an adoption, neither can the adoption be complete without the observence of the same. (See *ante*, pp. 247—255.) His other opinion, namely,—"Should the oblation to fire be partly omitted in consequence of inability, the adoption is sometimes good in law," seems not to be correct in every respect, inasmuch as, of the several *homas*, only the *Váma-devya* (which is a supplementary one) can be dispensed with: save and except that, no other *homa* necessary in adoption, can be wholly or partly omitted without leaving the adoption incomplete. Then as to his opinion last quoted,—namely, "If the intention of giving and receiving be expressed in the terms: 'I give him to you as a son,' 'I take him as a son,' he becomes a son; nothing else is required: since no one has declared that filiation is null, if the oblation to fire be omitted,"—it is to be observed that, it has been conclusively laid down in the *Dattaka-mímánsá* and intimated in the *Dattaka chandriká*, which are paramount authorities on the subject of adoption and are followed in practice in preference to all others, that—'of gift, acceptance, burnt sacrifice (*homa*), and so forth, should *any* be wanting, the filial relation and even the heritable right fail.'‡ Consequently, the assertion that—'No one has declared that filiation is null if the oblation to fire be omitted'—is contrary to fact. Besides, adoption is permitted on the principle that the adopted son is born again in the family of his adopting father, and this regeneration can only take place by the performance of the religious rites ordained for the purpose: thus much is manifest from the following dicta of his own: "Birth caused by male seed and uterine blood is one ground of filiation; the second birth, by investiture or other ceremonies, is equally a good ground of filiation, by whomsoever performed. When he who has procreated a son gives him to another, and that child is born again *by the rites of initiation*, then his rela-

* It may be the duty of a Court of Justice administering the Hindú law to consider the religious duty of adopting a son as the essential foundation of the law of adoption, and the effect of an adoption upon the devolution of property as a mere legal consequence.—Part of the Privy Council Decision in *Sri Virada Pratapa* v. *Sri Brojo Kishoro Patta Deo*.—See *Vyavasthá-chandriká*, Vol. II, Part ii, page 52.

It is to be remembered that the institution of adoption, as it exists among the Hindús, is essentially a religious institution. It originated chiefly, if not wholly, from motives of religion, and an act of adoption is, to all intents and purposes, *a religious act*.—Part of the decision of the Calcutta High Court in *Rájá Upendra-lál Ráy* v. *Rání Brahma-moyí*. See *Vyavasthá-chandriká*, Vol. II, part ii, page 128.

† See the Preface. ‡ See *ante*, page 355.

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tion to the giver ceases, and a relation to the adopter commences: this birth cannot afterwards become null by his erroneously reverting to his original family." (See *Coleb.* Dig., Vol. II, pp. 149, 150.) Furthermore, had the mere gift and acceptance been sufficient to establish the relation of the adopted as son to the adopter, then the non-performance of his initiatory ceremonies by the adopter would not have rendered him a slave.* An adoption therefore is complete and valid not merely by gift and acceptance, *but by the performance of the necessary rites*, preceded by a formal gift and acceptance with recitation of *mantras*,† should any of them be wanting, the filial relation must also be wanting, as has been justly concluded in the *Dattaka-mímánsá*.‡ Thus JAGAN-NÁTHA'S dicta that, save and except gift and acceptance nothing else is required (for the validity of an adoption), are quite erroneous, and as such, they cannot be followed in opposition to the doctrine laid down in those two works, which are of paramount authority on adoption.

The above is also applicable to Mr. Colebrooke's remarks, which are founded principally upon those of JAGAN-NÁTHA'S. It would seem that, at the time of writing them, the passages contained in the *Dattaka-mímánsá* and *Dattaka-chandriká* did not occur to the mind of Mr. Colebrooke, as otherwise he would not have followed JAGAN-NÁTHA in preference to those paramount authorities.

After this, it is unnecessary to criticise the remarks of Sir Thomas Strange. The only one to be taken notice of is, that he says: "The *datta-homa* with the holy texts of the *Vedas* can only be performed by the *Bráhmanas:* the other classes, particularly the *Shúdras*, upon this, like other occasions, perform an imitation of it from the *Puránas*." But although no other class than that of *Bráhmanas* are allowed *personally* to perform the *homas* and other rites by repeating the holy words from the *Vedas*, yet all those classes can, and *do* usually, employ *Bráhmanas* to officiate for them in the performance of such rites (see *ante*, p. 353). Moreover, according to the *Dharma-shástra*, it being necessary for the inferior classes also to perform the *homa* like the *Bráhmanas*, even the *Shúdras* are, for completion of the religious ceremonies of great consequence, (as adoption and the like,) directed to have the *homa* performed by *Bráhmanas*, as is evident from the following passage of the *Dattaka-nirnoya:* "VASHISHTHA—'Nor let a woman give or accept a son, unless with the assent of her lord. A person, being about to adopt a son, should receive him, having convened (his) kinsmen, announced (his intention) to the king, and having offered a burnt offering *homa* with recitation of prayers (denominated) *Vyáhriti* in the middle of his dwelling.'—Here it being intimated that a woman may give or accept (a son), and that *homa* should be performed in the adoption of a son, let it be known that there is no impropriety in her per-

* See *ante* p. 331. † See *ante*, pp. 347—355. ‡ See *ante*, p. 355.

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forming the *homa* through *Bráhmanas*, just as (she does) when completing a voluntary religious ceremony *(vrata)*, and so forth;—'a *Shúdra* also should act in like manner.'" (1) By the assertion 'a *Shúdra* also should act in like manner,' the *Kshatriyas* and *Voishyas* are *á fortiori* entitled to perform the *homa* through *Bráhmanas*, as is actually done by them.

After giving the above interpretation of the text of VASHISHTHA, the author of the *Dattaka-nirnoya* indiscriminately for *all* the tribes, not excepting even the *Bráhmanas*, gives his own opinion by saying—"Adoption of a son is also valid even without the performance of the burnt sacrifice *(homa)* and other parts (of the ceremony), but invalid without tonsure and other initiatory rites (being performed in the family of the adopter)."* But this, being, as it is, contrary to the ordinance of the holy sages as well as to the doctrine of the paramount authorities on the subject (the *Dattaka-mímánsá*, and *Dattaka-chandriká*), more especially contrary to the invariable practice of good persons, a practice founded upon the ordinances of our religion, must be disregarded as of no weight.

Vyavasthá. **379.** If the initiatory rites, which, regard being had to the adoptee's age, ought to have been performed upon him before his adoption, were not performed by the natural father, they are to be performed by the adopter, as otherwise the filial relation will fail.

Annotations.

(1) Accordingly, Sir William Macnaghten has very properly written that—'According to the authorities which are followed in Bengal and Benares, a woman is competent, after the death of her husband, to adopt a son, provided he gave her permission to do so during his life-time; and according to the law of the Western Provinces, with the sanction of the husband's kindred, after his death; these authorities contending that although a woman cannot of herself perform the ceremonies requisite to adoption, yet that there is no objection to her calling in the assistance of learned *Brahmins*, as is *practised by* Shúdras *on similar occasions*.'—Macn. H. L. Vol. I., pp. 90—95.

379. Birth caused by male seed and uterine blood is one ground of filiation; the second birth, by investiture and other ceremonies, is equally a ground of filiation, by whomsoever performed. When

* See *Dattaka-Shiromani*, Sans., pp. 138, 139.

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If, however, the initiatory rites, which should have taken place previously, have not been performed by the natural father, they are, in that case, to be completed by the adopter even, on account of the indispensable necessity of removing the taint of the seed and womb, and for the sake of preserving the order, prescribed for the performance of the rites in question.—*Dat. Ch.*, Sect. II, § 22. Authority.

Although sprung from the seed of another, sons given, and the rest, when duly initiated under his own family name (that is by the adopter, according to the form prescribed by his own code, under the family name of himself,) into the different rites, commencing with that for a male born, then become sons to the adoptive parent, not otherwise.—*Dat. Mím.*, Chap. I, § 23. Authority.

380. Should a boy be adopted *after* his tonsure, then according to all authorities the adopter must first perform the sacrifice for male issue (*putreshti*), and afterwards the initiatory rites performable subsequently to the tonsure, that is, the *upanayana* and marriage ceremonies of the adopted. And,— *Vyavasthá.*

381. Should a boy who is above five years of age, and whose tonsure has not yet been performed, be received in adoption, his filiation must be completed by the adopter by the performance of tonsure, &c., preceded by *putreshti,* or sacrifice for male issue. *Vyavasthá.*

Annotations.

he who has procreated a son, gives him to another, and the child is born again by the rites of initiation, then his relation to the giver ceases, and relation to the adopter commences.—*Coleb.* Dig., Vol. III, p. 149.

Where a child not related by blood is to be adopted, (as may be the case where one so related is not to be had,) it may be consistent to depend for the confirmation of the tie, upon the performance of the initiatory rites in the adopting family, by means of which the adopted is considered to be in effect born again, thus becoming more essentially the son of his adopting parent.—Stra. H. L., Vol. I, p. 90.

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Authority. And accordingly, since extinction of relation to the family [of the natural father] and so forth is shewn, and as a text recites,—"Let the father initiate his own sons,"—the initiatory rites, even of the adoption, which are yet to be completed subsequent to adoption, are to be performed by the adopter; but those already performed by the natural father are not to be cancelled. For, any argument in respect to the renewal of these is wanting; since the removal of the taint of the seed and so forth, and the acquisition of priesthood, as suggested in the following texts, have already taken place. "Thus the sin produced by the seed and womb acquires expiation, &c."—*Dat. Ch.*, Sect. II, § 20.

Authority. "*Sacrifice for male issue.*"—Since persons of the first three tribes only are competent to perform this, by such persons the filial relation must be completed, through the rites of tonsure, and the rest, preceded by a sacrifice for male issue. But by a *Shúdra* the same even (is produced) through the rite of marriage alone.†—*Dat. Ch.*, Sect. II, § 32.

Vyavasthá. **382. A *Shúdra's* adoption must be effected or perfected by the performance of his marriage ceremony under the family-name of his adopter.†**

In fact, the marriage ceremony of adopted sons of any class or caste must be performed under their respective family-names; the same being the last of all the initiatory rites.†

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* Marriage is the only sacrament for *Shúdras*. See *ante*, page 145.

† See *ante*, page 145.

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CHAPTER II.

EFFECTS OF ADOPTION.

SECTION I.

ON THE GENERAL EFFECTS OF ADOPTION.

383. An absolutely given son *(shuddha-dattaka)* properly adopted by the performance of the ceremonies performable at the time of, and the initiatory and other rites performable after, his adoption,* is held to be born again in the family of his adopter; and the effect of it is, that, ceasing to belong to the race or general family *(gotra)* of his natural father, he becomes a member of the family of his adoptive father, represents his legitimately begotten son *(ourasa)*, and the duties and rights of the *ourasa* son devolve upon him. *Vyavasthá.*

Vide Precedents, pages 609—615, *et seq.*

And this even is proper. The adopted son, as substitute for the real legitimate son, being the agent of rites performed by a legitimate son, it follows that he is the performer of funeral repasts, the objects of which are the *manes* in honor of whom the legitimate son performs such repasts. For, without difference, relation to the father and other sires of the adopter obtains; in the same manner, as relation to the general family, the *shákhá* (or branch of the *Veda*), the family deity, and family rules of that person.—*Dat. Mím.*, Sect. VI, para. 53. Authority.

Annotations.

383—385. The *legally* adopted *dattaka*, or son given, in all cases, is invested with every filial right in respect to his adoptive father, of whose family he becomes a member. The *dattaka* adopted son ceases to have any claim to the family or estate, and is incapable of performing the funeral rites of his natural father, except where affiliated as a *dwyámushyáyana*, or son of two fathers. The adopted son cannot marry any kinswoman related to his (natural) father and mother, within the prohibited number of degrees, as his consanguineal relation endures; nor can the son of two fathers marry

* See *ante*, pages 347—362.

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Vyavasthá. **384.** He has no longer a connection with his natural parents and their families; and the reciprocal duties (*a*) and rights (*b*) also become extinct.

(*a*) By 'duties' is here meant the contracting of impurity, the performance of obsequies, and so forth.

(*b*) By 'rights' is meant the title to inherit, and the like.

Vyavasthá. **385.** The only relation which still subsists is that of *sapinda* by the body, that is, through consanguinity; and it is on account of the existence of this relation and the like that an adopted son cannot marry in the families of his natural parents.*

Vide Precedents, page 609—615, *et seq.*

Annotations.

in the general family of either. The adopted son not only inherits of his adoptive father, but likewise, lineally and collaterally, of the near and distant kinsmen of that person. He likewise represents the real legitimate son in relationship to his adoptive mother, whose ancestry are his maternal grandsires.—Sutherland's Synopsis, Head Fourth.

The adoption being once completed, the son adopted loses all claim to the property of his natural family, but he is estranged from his own family partially only. For the purposes of marriage, mourning, &c., he is not considered in the light of a stranger, and the prohibited degrees continue in full force as if he had never been removed. His own family have no claim whatever to any property to which he may have succeeded; and in the event of a son so adopted having succeeded to the property of his adopting father and leaving no issue, his own father cannot legally claim to inherit from him, but the widow of his adopting father will succeed to the property. He becomes (with the exception above noticed), to all intents and purposes, a member of the family of his adopting father, and he succeeds to his property collaterally as well as lineally.—Macn. H. L., Vol. I, pp. 69, 70.

The above two remarks do not appear to be correct in every respect, since in impurity also the *dattaka* son is estranged from the family of his natural father; and he is prohibited to marry not only

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* See the Chapter on Marriage, *ante*, page 153, and the Section treating of the *Sapinda* relation, post, page 367.

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MANU:—A given son must never claim the family and estate of his natural father. The funeral cake follows the family and estate: but of him who has given away his son, the obsequies fail.—Chap. IX, *v.* 142. Authority.

It is declared by this that, through the extinction of his filial relation from gift alone, the property of the son given, in the estate of the giver, ceases; and his relation to the family of that person is annulled.—*Dat. Ch.*, Sect. II, § 19. Authority.

But, although, by the text of MANU (above quoted), connection with the family of the natural parent is annulled, what proof is there as to the connection with the family of the adopter being established? On this point *Vrihat* MANU declares—"Sons given, purchased, and the rest, retain the relation of *sapinda* to the natural father, as extending to the fifth and seventh degrees; like this, their general family, (which is) also that of their adopter." The relation as *sapinda* of sons given, purchased, and the rest, to the natural parent, continues: by gift, and so forth even, that does not fail; for, by reason of consisting in connection through containing portions (of the natural father), it is not possible to be removed, while the body lasts. By this it is declared that the relation of *sapinda* in question is the consanguineal connection only, and not connection by the *pinda* or funeral cake: for, that this latter is barred is shown by this passage—"Of him who has given away his son, the obsequies fail." Anticipating a question as to the extent of this relation as *sapinda*, the author adds—"Extending to the fifth, and to the seventh, degree,* &c."—*Dat. Mím.*, Sect. VI, § 9, 10. Authority.

Therefore, not being otherwise inferable, the relation of *sapinda*, in the peculiar family (*kula*) of the adopter, as founded only on express texts of law, must be admitted. Authority.

Annotations.

within certain degrees in the family of his natural father, but totally in that *gotra*.—See the Section treating of Impurity and the Chapter on Marriage.

Adoption being the substitution for a son begotten, its effect is, by transferring the adopted from his own family, to constitute him son to the adopter, with a consequent exchange of rights and duties. Of these, the principal are the right of succession to the adopter on the one hand, and the correlative duty of performing for him his last obsequies on the other.—Stra., H. L., Vol. I, p. 85.

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Thus it is declared:—"The relation of *sapinda* is of two descriptions: through consanguinity, and connection by funeral oblations. Of these, the relation of *sapinda* arising from consanguinity being obviously barred in the case of the adopted son, HEMÁDRI has determined the relation of *sapinda*, of sons given, and the rest, in the family of the adoptive father, as extending only to the third degree.*—*Dat. Mím.*, Sect. VI, § 32.

Sapinda by consanguinity described.

The relation of *sapinda* by consanguinity is thus described in the *Mitákshará*: "The relation of *sapinda* is by the connection with (or by containing a portion of) the same body. Thus the son having sprung from the body of his father, bears the relation of *sapinda* (through consanguinity) with his father; so also with the paternal grandfather and the rest, since there exists consanguinity between him and them through the father. In like manner, having sprung from the body of the mother, he bears the relation (of *sapinda*) to her, also to the maternal grandfather and the rest, and the mother's brother, sister, and the rest, by reason of consanguinity through the mother; so also to the father's brothers and sisters and the rest (by reason of consanguinity through the father:) the wife commencing to be of the same body with the husband, (bears the *sapinda* relation to the husband): the brother and brother's wife likewise commencing reciprocally to be of the same body are *sapindas* by reason of being from the same body. Thus, wherever the word '*sapinda*' is (used), there consanguinity must be known to exist directly or indirectly.†—*Mitákshará A'chára Adhyáya*, Sans. pp. 5, 6. See *Parásara-mádhava.*

The *sapinda* relation by connection of the funeral cake is described at pages 102, 103, *q. v.*

Vyavasthá.

386. The *dwyámushyáyana* (or son of two fathers) becomes a member of his adopter's family, continuing at the same time to belong to the (*gotra*) race or general family of his natural father; and his relation with the family of his natural mother also fully subsists, notwithstanding

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Annotations.

386. The adopted may retain filial relation to his natural father, in which case he is called *dwyámushyáyana*, or the son of two fathers.—Sutherland's Synopsis, HEAD FIFTH.

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* See the Section on the *Sapinda* relation—post p. 367.

† See the descriptions of two kinds of *sapindas*, *ante*, pp. 102, 103.

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the creation of his relation with the family of his adoptive mother (*a*).*

(*a*) Here by '*adoptive mother*' is meant the wife of the adopter, whether or not she joins him in the adoption or adopts a son by his authority; but where there is more than one wife, there she, of them, who joins the husband in adopting a son, or adopts one under his permission, is really the adoptive mother; not so the other wife or wives of the adopter, because, the former having especially received the son in adoption, and thus being actually the adoptress of that son, no one else has any claim to be his adoptive mother, but, being a wife of his adoptive father, can only be held as his step-mother. If, however, the adopter receive a son singly, and not in conjunction with any wife, then all of his wives are equally the adoptive mothers of the adopted, because they, having commenced to be of the same body with their husband,† become, as a matter of course, the mothers of the son adopted by their husband. Adoptive mother defined.

387. The offspring of an *anitya-dwyámushyáyana*, however, do not belong to the two *gotras*, but only to the *gotra* of his (the *anitya-dwyámushyáyana's*) natural father.‡ *Vyavasthá.*

SECTION II.

On the Sapinda Relation, &c.§

388. The *dattaka* being the substitute for the legitimately begotten son *(ourasa)*, the persons related to the adopter as *sapindas, sakulyas, samánodakas*, and *sagotras*,‖ bear respectively the same relation to the *dattaka*, and *vice versá*; and the father, grandfather, and great-grandfather of his adoptive mother are related to him as *sapindas*, and so is he to them. *Vyavasthá.*

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* See the Annotations at pp. 363, 364. † See the preceding page.

‡ See *ante*, pages 340—347.

§ See the descriptions of *sapindas*, &c., at pp. 102, 103, and pp. 365, 366.
‖ See *ante*, pages 174, 175.

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Authority. The forefathers of the adoptive mother only are also the maternal grandsires of sons given, and the rest, for the rule regarding the paternal, is equally applicable to the maternal, grandsires [of the adopted sons].—*Dat. Mím.*, Sect. VI, para. 50.

Authority. As for what is said by HEMÁDRI that—"the precept enjoining the performance of a funeral repast in honor of the maternal grandfather, refers to the natural maternal grandfather",—that is inaccurate; for it is at variance with the passage—"Of him who has given away his son, the obsequies fail." Nor is the capacity of the maternal grandsires as givers wanting; for by reason of their affording their assent to the gift (as appears from this passage—"Having convened his kindred, &c.")—they also are parties to the same." Besides, by this passage—"The funeral cake follows the family and estate"*—the family and estate are declared to be the cause of performing the funeral repast; and the estate of the maternal grandfather also, like that of the father, lapses from the son given. His incapacity to perform a funeral repast in honor of his original maternal grandfather is properly declared.—*Ibid.*, para. 51.

Authority. Accordingly, HEMÁDRI himself not being satisfied with that [just stated], has advanced the other position :—"In the same manner as for the secondary father, a funeral repast must be performed in honor of the secondary maternal grandfather and the rest."—*Ibid.* § 52.

Vyavasthá. **389.** Where the son adopted was not originally a *sapinda*, in that case, there exists between him and the families of his natural parents, only the relation of *sapinda* by the body or through consanguinity, and there is created between him and the families of his adoptive parents the relation of *sapinda* through oblation cakes.†

Vyavasthá. **390.** In the case, however, of an adopted son's having been originally a *sapinda*, his *sapinda* relation with the family of his adoptive father

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* MANU, Chapter IX, verse 142.

† The word '*pinda*' signifies either the body or a ball of rice, &c., presented to the *manes* of the deceased; the word *sapinda* therefore may denote either one consanguineally related or one connected through an oblation of such funeral ball or cake. See *ante*, pp. 102—103, and 366.

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is through consanguinity, as well as through the oblation cake; that, with the family of the adoptive mother, is through the oblation cake, and with the family of the natural mother, through consanguinity.

391. The *sapinda* relation of a *dwyámushyáyana* with the families of his natural parents, is both through consanguinity and the oblation cake, that with the family of his adopter—in the case of his being originally a *sapinda*,—is of both descriptions, otherwise through the oblation cake; and that with the family of his adoptive mother, in either case, is through the oblation cake. *Vyavasthá.*

392. The relation of *sapinda* by the body or through consanguinity extends to the seventh degree in the family of the father, and to the fifth degree in the family of the mother or maternal grandfather. (See Marriage.) *Vyavasthá.*

GOUTAMA.—With the kinsmen, on the side of the father, *viz.*, the procreator (*víjí*) beyond the seventh degree; and with those on the mother's side, beyond the fifth, &c.—*Dat. Mím.*, Sect. iv, § 11. Authority.

Here the word *víjí* (the procreator) is used, for the sake of comprehending every one, even the natural father of a son given and so forth; not merely the natural father of the son of the wife: for, a text of MANU declares—"As for these, denominated from the context, sons, though produced from the seed (*víja*) of others, they are (sons) of that person from whose seed they severally sprung, and of no other."—They are sons of that person.]—This declaration, that they are sons, is for the sake of propounding the connection of *sapinda* (by the body), and not to establish filial relation.—*Dat. Mím.*, Sect., VI, § 11—13. Authority.

393. A *dattaka* son's relation of *sapinda* through the oblation cake extends to three degrees,—the ancestors, who eat the remnants of the oblations wiped off with *kusha* grass, being disappointed in the *Párvana-shráddha* (*a*) performed by a *dattaka*. *Vyavasthá.*

(a) Párvana-shráddha is the offering of a double set of oblations at the *parva*,—viz., three cakes to the father, paternal *Párvana* explained.

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grandfather, and great-grandfather, and three to the maternal grandfather, his father and grandfather; and the remnants of each set to the three remoter ancestors of each line.

Parva explained. "The fourteenth and eighth days of each half lunar month, the full moon and new moon, also the time of the sun's entering on a new zodiacal sign: these, O great king, are (called) *parvas*."—*Vishnu-purána.*

Authority. Of the absolutely adopted son, the relation of *sapinda*, in the family of the adopter, consisting in connection by funeral oblations, extends to three degrees: in the family of the natural father, arising only from consanguinity, it extends to seven degrees.—*Dat. Mím.*, Sect. VI, § 39.

Authority. KÁRSHNÁJINI.—As many as there may be degrees of forefathers, with so many their own forefathers, let sons given, and the rest, *associate the deceased* in order, their sons with two forefathers, their grandsons with (*samam*) one, [should do] the same,—the fourth degree is excluded. This (relation of *sapinda*) extends to three degrees.—See *Dat. Ch.*, Sect. III, § 19; and *Dat. Mím.*, Sect. VI, § 33.

Interpretation This is the meaning of the text,—according as the deceased adoptive fathers may be sons legitimate, adopted (absolutely), or of two fathers: as many degrees as there may be of forefathers, three or six, with so many, let sons given, and the rest, associate them;—that is, connect by admixture of funeral cakes.—Of the cases in question, where the adoptive fathers are real legitimate sons (the forefathers with whom their association is to be made,) are three, *viz.*, the father, paternal grandfather, and great-grandfather; where sons adopted absolutely, three; *viz.*, their adoptive father, grandfather, and great-grandfather; and where sons of two fathers, six, *viz.*, their natural father and the other two, and their adoptive father and the other two. And thus it is intimated that those, who are the revered objects, contemplated at a *párvana* rite, performed by the adopted son himself, are the same at the *sapindí-karana* ceremony also, celebrated, for the adopted son by his own son: and the sons of an adopted son should perform his *sapindí-karana* with his adopter and two out of the three forefathers of this latter. And, in the same manner, the grandsons of the adopted son should perform the same,—that is, the association of their own fathers,—by admixture of funeral cakes with (for '*sama*' is used by KÁRSHNÁJINI, in the sense of this proposition) the adopted son, the adopter, and one out of the three forefathers of that person, *viz.*, the father of the adopter. The fourth degree is excluded.—*Dat. Ch.* Sect. III, § 20—22.

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"The sons given, purchased, and the rest, who are adopted from those of his own general family, by observance of forms, acquire introduction into the family (of the adopter). But the relation of *sapinda* is not included." The meaning is—sons given, and the rest, though adopted from those of his own general family, by the observance of forms only, participate in the family (of the adopter). But the relation of *sapinda* is not established in them: and such relation not obtaining in those belonging to the same general family, of course it cannot subsist in those of a different general family. As for this text of *Vriddha* GOUTAMA, it is prohibitory of the relation of *sapinda* extending to seven degrees, which might be inferred from analogy to the real legitimate son: or, it bars the impurity for ten days, and so forth, arising from the relation of *sapinda*. But, it does not prohibit totally such relation, on account of the several texts, before cited.—*Dat. Ch.*, Sect. III, § 26. Authority.

394. But wherever the relation of *sapinda* is said to extend to three degrees, there the same must be understood to be applicable to the ceremony of *sapindi-karana*, and not to marriage, in which such relation extends to the seventh degree in the family of the adoptive father, as well as in that of the natural father, and to the fifth degree in the family of the adoptive mother, as well as in that of the natural mother.* *Vyavasthá.*

The relation of *sapinda* in question does not apply to marriage,* but is an universal relation, of that denomination, predefined as extending to the seventh degree in the line of the father, and to the fifth in that of the maternal grandfather. Thus there is no inconsistency.—*Dat. Ch.*, Sect. IV, para 9. Authority.

SECTION III.

ON UNCLEANNESS OR IMPURITY.

395. Between an absolute adopted son (*shuddha-dattaka*) and the family of his natural father, there is no reciprocal impurity. *Vyavasthá.*

Next, uncleanness (on occasions of birth and death) in respect to the adopted son, is determined. That is not reciprocal, in the family of the natural father, on account Authority.

* See *ante*, pages 102, 108, and the Section on Marriage.

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of the text of MANU: "A given son must never claim the family, and the estate of his natural father. The funeral oblation follows the family and estate: but of him, who has given away his son, the obsequies fail."—*Dat. Mím.*, Sect. VIII, para. 1.

Authority. The terms 'funeral oblation' and 'obsequies' in this text are inclusive of every observance in honor of *manes*, uncleanness and so forth; for the exclusion of the family and estate, which are the cause of presenting the funeral oblation and so forth, is mentioned: and it is a restrictive condition that uncleanness, which is spiritual, precede the presenting of the funeral oblation, and so forth, in honor of the dead.—*Ibid.*, para., 2.

Authority. Next, the impurity, and so forth, of the adopted son (on occasions of birth and death) is determined. In respect to this topic, (it is to be observed, that) there is no reciprocal impurity of the absolute adopted son, in the family of the natural father; for, relation to his family, and the presenting in his honor funeral oblations, being barred, the extinction of uncleanness is an obvious consequence. But the impurity of the *dwyámushyáyana* is in both families.—*Dat. Ch.*, Sect. IV, para 1.

Authority. In the *Brahma-purána* (it is written): "The son given, the son self-given, the son made, as well as the son purchased, and the deserted son, who are always to be cherished, belong to a different family, present distinct oblations, and perpetuate a different lineage, and on occasions of birth and death, become impure for three days."—*Dat. Ch.*, Sect. IV, para., 2.

Vyavasthá. **396.** There is reciprocal impurity for three days between the adopted and his adopter's family.

PARÁSARA:—On occasions of birth and death, impurity for three days is ordained for him, who, whether of a different or of the same general family, by the will (of the adopter), is initiated and adopted.—*Dat. Ch.*, Sect. IV, § 3.

Authority. So also, excepting the legitimate son, on the death and birth of the son of the wife and the rest, a general impurity, lasting three nights, always (*a*) takes place in every tribe.—This is a settled point.—*Ibid.*, § 4.

(*a*) '*Always.*'—Subsequent even to the investiture of the characteristic thread.—*Ibid.*, § 5.

Authority. As the relation of one, though of the same general family, to the family of his adoptive father, is attained through the

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observance of form, after the previous extinction of relation to the family of his natural father; there is no distinction between an adopted son of a different general family (and one of the same). Therefore, the uncleanness for three days, propounded in the text in question (indifferently for either), is even proper.—*Ibid.*, § 5.

"The son given, the son self-given, the son made, as well as the son purchased, and the deserted son, who are always to be cherished, belong to a different family, present distinct oblations, and perpetuate a different lineage, and on occasions of birth and death, become impure for three days." By this text of the *Brahma-purána** as well as by the foregoing text of PARÁSARA,* the extent of impurity in the case of a son being adopted from amongst the *sapindas* of one's own *gotra* not having been defined, the greater part of the Hindú jurists is of opinion that impurity, in that case, is to extend to the full period.† Remark.

This opinion seems to be consistent with the intent of the law, because, if an adopted son received from amongst the *sapindas* of one's own *gotra* remain also impure for three days, then what is the difference between him and a son adopted from a different family; so it is proper to distinguish him from the other *dattakas* in respect of impurity, in the same manner, as by reason of propinquity, he is preferred to others in respect of adoption. Remark.

The author of the *Dattaka-mímánsá*, too, appears to have implied the above doctrine from the following passage:—"On the death of the adopter, the uncleanliness of the adopted son, for ten days, is not fit, since the (general) relation of *sapinda*, and connection by the identity of family, associated together, are wanting in him."—*Dat. Mím.*, Sect. VIII, para. 12.

For as many days as impurity is contracted by a *dattaka* or given son, on the death of a particular person, for so many days does that particular person contract impurity on the death of the *dattaka*: such is also the case with the *dattaka's* son, grandson, and the rest. This, then, is the sum of it:—

The offspring of a *dattaka* and the family of his natural father contract no impurity on the birth and death of each other. The adopter, his father, and paternal grandfather,

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* Cited in the last page.

† The full period of impurity is as propounded in the following text:—"A *Bráhmana* becomes free from impurity after ten days; a *Kshatriya*, after twelve days; a *Voishya*, after fifteen days; and a *Shúdra*, after one month."—See *Nirnoya-sindhu*, &c.

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contract impurity for three days on the death of the *dattaka*; and on the birth and death of his son, son's son, and the rest: so also do the *dattaka*, and the rest, on the death of those ancestors, and on the birth and death of their offspring. There is impurity for one day on the death of the *sakulyas* from the adopter's paternal great-grandfather to the tenth degree* ascendant, and on the birth and death of their offspring: the impurity contracted on the birth and death (as the case may be) of the *samánodakas** and *sa-gotras** is removed immediately after bathing. The females of both sides contract impurity for the same period as the males in the same degree of affinity.

Vyavasthá. **397.** The *dwyámushyáyana*, or son of two fathers contracts impurity in both families:—his impurity extends to the full period on the birth and death of a member of the family of his natural father; and for three days on the birth and death of one belonging to the family of his adopter (of a different *gotra* and family).

SECTION IV.

On Shráddhas,† &c.

The adopted son, as substitute for the real legitimate son (*ourasa*), being the agent of rites performed by a legitimate son, it follows that he is the performer of funeral repasts, the objects of which are the *manes*, in honor of whom a legitimate son performs such repasts. For, without difference, relation to the father and other sires of the adopter obtains; in the same manner as relation to the general family, the *shákhá*, the family-deity, and family-rules, of that person.—*Dat. Mím.*, Sect. VI, § 53.

Vyavasthá. **398.** The adopted son is to perform the adopter's funeral obsequies, the sixteen *shráddhas*, commencing with the first and ending with the *Sapindikarana*,‡ the *Ekoddishta*§ *shráddha*, and the *Párvana*‖ *shráddha*, &c.

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* See *ante*, pages 102, 103.

† *Shráddha* is an offering made to the *manes* of a deceased ancestor or other person at appointed times.

‡ See post, page 377.

§ An offering made to the *manes* of a single ancestor or deceased person.

‖ See *ante*, pages 369, 370.

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MANU:—A son of any description must be anxiously adopted by a man destitute of male issue, for the sake of the funeral cake, water, and solemn rites, and for the celebrity of his name.—See *Dat. Ch.* Sect., I., § 3. Authority.

399. But, although the son given be first adopted, yet a legitimate son existing, the former is not competent to officiate in the sixteen funeral repasts (*shráddhas*) ending with the *sapindíkarana*.—*Dat. Ch.*, Sect. III., § 1. *Vyavasthá.*

For his superiority in rank is barred by DEVALA (who says): "A real legitimate son being subsequently born, superiority of rank from age does not vest in them." And a text of YÁJNAVALKYA recites: "Amongst these, the next in order is heir, and presents funeral oblations, on failure of the preceding."—*Ibid.* Authority.

400. But, on the aniversary of the day of death, the *dattaka* can perform only the *Ekoddishta shráddha*,* and not the *Párvana*,* which should be performed by the *ourasa* son. *Vyavasthá.*

Thus JÁTÚKARNA: "Annually (*a*), let the son of the wife, and legitimate son, perform (obsequies) according to the *Párvana* form: the other ten sons should perform a rite dedicated to a single person." 'The other ten.']—The son given, and the rest.—*Dat. Ch.*, Sect. III, § 2, 3. *Dat. Mím.*, Sect. IX, para. 2. Authority.

Therefore, this is the accurate exposition of the law,—that, on the anniversary of the day of death, in honor of the father and mother, a *párvana* funeral repast only should be performed by the legitimate son (*ourasa*): by the others (the son given and the rest,) merely one consecrated to a single ancestor.—*Dat. Mím.*, Sect. IX, § 8. Exposition.

(*a*) 'Annually'—From this general mode of expression, although the monthly (*amávasyá*) and the other periodical funeral repasts be inferrible, that only on the anniversary of the day of death is meant. For the terms—'the anniversary of the day of death'—are expressly used in this text of† Authority.

PARÁSARA:—"(A funeral repast), by the legitimate son, for a father, who has departed this life, on all occasions, is in honor of three ancestors: that by those belonging to *aneka-gotra*, or more than one family (*b*), is the rite consecrated to a single person, on the anniversary of the day of death."—*Dat. Mím.*, Sect. IX, § 2.—*Dat. Ch.*, Sect. III, § 5. Authority

* See *ante*, pp. 369, 370, 374. † *Dattaka-mímánsá*, Sect. IX, § 2.

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Explanation. *(b)* 'By those belonging to more than one family.']—Meaning those belonging to two families.—*Dat. Ch.*, Sect. III, para. 5.

Vyavasthá. **401.** The given son (*dattaka*) is to perform also the *shráddha*, &c., of his adoptive mother.

Authority. But the absolutely adopted son presents oblations to the father, and the other ancestors, of his adoptive mother only; for he is capable of performing the funeral rites of that mother only.—*Dat. Ch.*, Sect. III, § 17.

Vyavasthá. **402.** A *dwyámushyáyana*, as a legitimately begotten son (*ourasa*), is to perform the *shráddhas* and other rites, in honor of his natural parents, their ancestors and relations, and, as a given son (*dattaka*), in honor of his adoptive parents, their ancestors and relations.

Reason. Because, his rights and claims to the families of his natural parents are still the same as before, and those to the families of his adoptive parents are only as of a son given.—See *ante*, page 340.

Vyavasthá. **403.** But, if the adoptive father died first, (the son) should present the oblation (first) to him; if the natural father, then to the natural father; should both have died (at once), then let him present first to the natural father, and last to the adoptive.—*Dat. Ch.*, Sect. III, § 14.

Vyavasthá. **404.** The *dattaka* son is also to perform the (other) acts or duties prescribed in the (particular) branch of the *Vedas* followed by his adopter.

Authority. "Sprung from one following a different *shákhá* (or branch of the *Vedas*), the given son, even when invested with the characteristic thread, under the family-name of (the man) himself, according to the form prescribed by his peculiar *shákhá*, becomes a participant of the duties of such *shákhá*

Annotations.

401. He (the adopted son) likewise represents the real legitimate son, in relationship to his adoptive mother, whose ancestry are his maternal grandsires.—Sutherland's Synopsis, HEAD FOURTH.

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(*swa-shákha-bhák*)."—VASHISHTHA. That duty, in which his peculiar (that is, the adopter's) *shákhá* prevails, is a duty of such *shákhá;* in this he shares, or is a participant, &c. Such rite only as is prescribed by the *shákhá* of the adopter must be performed by him. This is the meaning.—*Dat. Mím.*, Sect. VI, § 49.

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405. In performing the *sapindí-karana*(*d*) of his adoptive father, the adopted son must connect him by admixture of funeral cakes, that is, associate him with his (the adopter's) father, paternal grandfather and great-grandfather. V*yavasthá.*

(*d*) *Sapindí-karana* or *sapindana* is the rite of associating the deceased with the *manes* of the departed ancestors by admixture of *pindas*, (oblation-balls, or cakes of rice, &c.) It should strictly take place on the anniversary of the day of death; but in case of the deceased leaving an only son, or no son, it may also be performed at any time within one year from the deceased's death after the performance of the fourteen monthly *shráddhas* called *másikas.* Explanation.

Whatever person, at any time, performs the ceremony of *sapindí-karana* for any one, he does the same with three forefathers only of that individual;—by this (which is the meaning of what preceded the passage cited) the exclusion of the fourth degree is established. The propounding of the same position, (by the passage in question, in conformity with the rule of logic,—"a position having been established, its re-introduction is for the sake of a peremptory rule,"—is meant to bar the relation as *sapinda* (to the adopted son) of those, who (in the case of a real legitimate son) would have partaken of the wipings of the oblations; by reason of their being precluded therefrom (in the present case). The author declares this very position (in subjoining) 'this:' that is, 'this relation of *sapinda*' (extends to the third degree*).—And thus, the general relation of *sapinda*, extending to the seventh degree, which is propounded in the *Matsya-purána*, in the text subjoined, is barred by the special rule in question:—"The fourth and the rest in ascent are the partakers of wipings, the father and the others participate in oblations of food, the seventh presents the same.—The relation, by oblations of food, of these extends to the seventh degree."*—*Dat. Ch.*, Sect. III, § 22, 23. Authority.

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* See *ante*, pages 102, 103.

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Vyavasthá. **406.** Where the adopter himself is a *dwyámushyáyana*, his *sapindí-karana* is to be performed with both of his (natural and adoptive) fathers, and their fathers and grandfathers.

Authority. KÁRSHNÁJINI :—" As many degrees of forefathers as there may be, with so many their own forefathers, let sons given, and the rest, associate the deceased."—Cited in *Dat. Ch.*, Sect. III, § 19; and *Dat. Mím.*, Sect. VI, § 33.

Vyavasthá. **407.** The *dwyámushyáyana* is to perform the *sapindí-karana* of his natural father with the father, paternal grandfather and great-grandfather of such father; and that of his adopter, with such of his three ancestors.

Vyavasthá. **408.** Where the adopter or natural father is himself a *dwyámushyáyana*, or both are so, there the *dwyámushyáyana* son is to perform the *sapindí-karana* with two sets of ancestors of such father or fathers.

Authority. KÁRSHNÁJINI :—As many as there may be degrees of forefathers, with so many their own fathers, let sons given, and the rest associate the deceased.—Cited in *Dat. Ch.*, Sect. III, para. 19 and *Dat. Mím.*, Sect. VI, § 33.

Vyavasthá. **409.** The *sapindí-karana* of the adoptive mother is, however, to be performed with her husband alone.

Authority. Thus GARGA :—" The oblation cakes of the fathers, (*i. e.*, the grandfather and great-grandfather,) being covered with *kusha* grass, the *sapindí-karana* of the female, (*i. e.*, mother) is to be performed with her husband alone; since she, after death, has become one and the same person (with her husband)." "The *sapindí-karana* of a woman is to be performed with her own husband; since her union with (the person of) her husband is effected by *charu*,* *mantra*,† *áhuti*,‡ and *vrata*."§—*Nirnoya-sindhu.*

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* See *ante*, page 353.

† A particular text or texts of the *Veda*, with the repetition whereof religious rites are performed.

‡ A burnt sacrifice, an oblation to fire.

§ A vow, a voluntary religious observance or imposition of penance or austerity.

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410. But if the father be alive, the mother's *sapindí-karana* is to be performed with the paternal grandmother; if she also happen to be alive, then it is to be performed with the great-grandmother. *Vyavasthá.*

Laghu HÁRITA:—"He (husband) being *in esse*, the sons are to perform it (the *sapindí-karana*) with the paternal grandmother. She (the mother's mother-in-law) being alive, it must be (performed) with her mother-in-law."—*Shráddha-tattwa.* Authority.

It is declared that, during the existence of (a woman's) mother-in-law, (it should be performed) with her (the latter's) mother-in-law, not with the woman's father-in-law. In some instances, that also has been intimated.—*Ibid.* Authority.

411. In the *párvana* shráddha* performed by a *dattaka* son, the ancestors, who enjoy the oblation food wiped off on a *kusha* grass, being deprived thereof,† only the oblation cakes are to be offered to the adoptive father, his father and grandfather: and the same are participated in respectively by their wives. *Vyavasthá.*

412. On the same occasion the *dattaka* should also perform the *párvana* shráddha* of the father, grandfather and great-grandfather of his adoptive mother,—whereby the *párvana shráddha* of his maternal grandmother, great-grandmother, and great-great-grandmother will also be performed. *Vyavasthá.*

It is intimated, that those who are the revered objects, contemplated at a *párvana* rite, performed by the adopted son himself, are the same at the *sapindí-karana* ceremony also, celebrated for the adopted son by his own son.—*Dat. Ch.*, Sect. III, § 21. Authority.

"Where the paternal sires are honored, there certainly are the maternal."—*Ibid.*, § 16. Authority.

Commencing with the father of the mother, three are considered maternal grandsires.—"Let the sons of daughters perform, for these, funeral oblations, as for the father."—MARÍCHI. By ordaining (in this text,) funeral oblations in honor of three maternal grandsires, the *párvana* or double rite only is inferred. From the expression—"as for the Authority.

* See *ante*, pages 369, 370. † See post, page 377.

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father,"—an option of performing, for the maternal grandsires also, obsequies in the form of *párvana* or *ekoddishta** is not obtained; for, the sentence in question is meant to enjoin the absolute necessity of the performance of obsequies, in honor of the maternal grandfather.—*Dat. Mím.*, Sect. IX, paras., 4, 5.

Authority. But, the absolutely adopted son presents oblations to the father, and the other ancestors, of his adoptive mother only, for he is capable of performing the funeral rites of that mother only.—*Dat. Ch.*, Sect. III, § 17.

Authority. SÁTÁTAPA:—After the first annual obsequies by the *sapindas*, whatever is given *at the monthly* rites to ancestors (*e*), *by the son of the deceased*, his mother has a share of the benefit: this is a settled rule in all systems of religious and civil duties.—*Coleb.* Dig., Vol. III, p. 598.

Explanation. *(e)* The word 'ancestors' (literally fathers) implies three paternal and three maternal sires,—namely, the father and the rest, and the maternal grandfather and so forth; and the word 'mother' indicates three female ancestors ascending from the mother, and three other female ancestors ascending from the maternal grandmother.—See *Idem*.

Authority. Except on the day of death, no separate oblations should be presented to women; since it is said that they enjoy the oblation cakes presented to their husbands.—*Udváhatattwa*,

Authority. A mother tastes with her husband the funeral repast, consisting of oblations to the *manes*; and the paternal grandmother, with her husband; and the paternal great-grandmother, with her's.—*Dá. Bhá.*, Chap. XI, Sect. vi, § 3.

Vyavasthá. **413.** Should the adopter have many wives, then the adopted is to perform the *párvana shráddha* in honor of the father and two other ancestors of that wife alone by whom he was received in adoption.

Authority. The forefathers of the adoptive mother only are also the maternal grandsires of sons given, and the rest: for, the rule regarding the paternal, is equally applicable to the maternal grandsires (of adopted sons).—*Dat. Mím.*, Sect. VI, § 50.

Authority. As for what is said by HEMÁDRI, that the precept enjoining the performance of a funeral repast, in honor of the

* See *ante*, page 374 note.

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maternal grandfather, refers to the natural grandfather; that is inaccurate; for, it is at variance with the passage,—"Of him who has given away his son, the obsequies fail." Nor is the capacity of the maternal grandsires, as givers, wanting: for, by reason of their affording their assent to the gift, (as appears from this passage,—"having convened his kindred, &c.,)" they also are parties to the same. Besides, by this passage,—"the funeral cake follows the family and estate"—the family and estate are declared to be the cause of performing the funeral repast; and the estate of the maternal grandfather also, like that of the father, lapses from the son given. His incapacity to perform the funeral repast, in honor of his original maternal grandfather, is properly declared.—Accordingly, HEMÁDRI himself, from not being satisfied with that (just stated) has advanced the other position: "In the same manner, as for the secondary father, a funeral repast must be performed in honor of the secondary maternal grandfather and the rest."—*Dat. Mím.*, Sect. VI, § 51, 52.

Remark.

Besides, the mother's right having become extinct through the gift made by the father, *á fortiori*, the right of the maternal grandfather and the rest must cease to exist through the gift by the mother.

Vyavasthá.

414. If, however, he was received by none of them, either in conjunction with, or under the authority of, her husband, but by the husband alone, then the adopted is to perform the *párvana shráddha* in honor of the ancestors of all such wives of the adopter.

Reason.

Because, the husband's act of adopting a son renders them all adoptive mothers of that son.*

Authority.

The mother being subject to the power of her husband, her property is divested by his gift: but it is not so in the case of wealth obtained through favor or the like, because, there is no subjection in respect of such property. Thus, if a son be adopted by the husband, the wife has a secondary claim to that child, because property is common to the married pair; and the line of the maternal grandfather is the ancestry of the adopter's father-in-law.—*Coleb.* Dig., Vol. III, p. 261.

Authority.

If a son be adopted by a man married to two wives, he would have two maternal grandfathers, and *would claim as*

* See *ante*, page 308.

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maternal ancestry both their lines of forefathers. This seeming difficulty is thus reconciled: although there be two sets of maternal ancestors, they should be jointly considered as *manes* of ancestors, and they should be thus named in performing the *shráddha*, 'such a one, maternal grandfather sprung from such a primitive stock; such a one, maternal grandfather sprung from such a primitive stock, to thee (*to each of you*) this (funeral cake is offered), and so forth,' as is done by the son of the wife considered as a son of two fathers.—*Coleb.* Dig., Vol. III, p. 453.

Remarks. JAGAN-NÁTHA does also say:—"In the double set of oblations, it is indispensably necessary that the son should perform the *shráddha* for the paternal line; not for the line of his maternal grandfather: but it is simply reprehensible in one who performs the *shráddha* for the paternal ancestors, not to perform it also for the maternal grandfather and his progenitors; consequently, since the *shráddha* may be performed without noticing the maternal grandfather's line in a subordinate double set of oblations and the like, the *shráddha* for the maternal ancestors is not requisite to the completion of the obsequies performed in the dark fortnight of *A'swina*. This observation of RAGHU-NANDANA and others is accurate. Accordingly, a widow, though she may perform acts of religion without consent previously declared by her deceased lord, cannot (without such consent) adopt a son given; for the text of VASHISHTHA declares: "let not a woman give or accept a son," &c. But, if her husband have assented, she may adopt a son given, as a son of the wife (is raised up to a husband by his consent): else it would have been expressed in the law, 'he shall not be the son of her husband unless (adopted) with the assent of her lord, but shall be her own son, to perform her obsequies and take her inheritance.' A son given is, therefore, the child, not of his adoptive mother, but of his adoptive father only." (See *Coleb.* Dig., Vol. III., pp. 253, 254.) But these being at variance with the paramount authorities above quoted, as well as the subjoined text cited in the commentary on the *Dattaka-chandriká*—"Whoever performs the *párvana shráddha* for his paternal ancestors, and does not perform it in honor of his maternal grandsires, commits the sin of killing his father."—And more especially with his own *dicta*, are unworthy of respect.

Vyavasthá. **415.** The *dwyámushyáyana* is to perform the *párvana shráddha* in honor of his two fathers and their ancestors.

Authority. An aphorism of SHÁNKHYÁYANA propounds a distinction in respect of the observances prescribed for the *dwyámushyáyana*: "Having duly performed the preparatory ceremonial, called *avanejana*, where there may be a diversity of fathers, both, at each oblation." Where there may be a diversity of

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fathers, at each oblation, both the natural father and the adopter,—'let him celebrate'—as is understood.—*Dat. Ch.*, Sect. III, § 7, 8.

Remark.

According to the text of a venerable saint, he (the adopted son) should perform two funeral repasts, or at one, contemplating them separately, he should designate, at each oblation, both the adoptive and natural fathers; together with the two ancestors in immediate ascent above each.—*Ibid.*, para 9. Accordingly—

Authority.

HÁRÍTA:—"Of these, in the first place, the tutelary saints of the natural father (are those of the adopted son). He should perform two several sets of funeral oblations, each consisting of two; or designate both, in each (*f*) oblation (of one set); his son—in his second, his grandson—in his third, (should do the same).—*Ibid.*, § 12.

Explanation.

(*f*) 'In each (*eka*) oblation,'—here a repetition (of the word *eka*) is understood on account of the text of A'PASTAMBA—"If son to both fathers, he should designate both, at each several oblation.—'In his second,'] at his oblation to his grandfather, the son of the *dwyámushyáyana*. 'In his third,'] that is, at his oblation to his great-grandfather, the grandson of the *dwyámushyáyana*."—*Dat. Ch.*, Sect. III, § 13.

Vyavasthá.

416. The *dwyámushyáyana* is to perform the *párvana shráddha* of the two sets of the maternal ancestors, as of those of the paternal ancestors.

Authority.

MARÍCHI:—"Let the issue (of two fathers) present (the oblations) first to the natural father: but the same must be given (to him) last, (should he survive, the adoptive father) being dead. If both have died (together, the oblation must be given,) first to the natural father: after him, the son should present the same to the adoptive father. Should it not be first offered to the natural father, it does not endure."—By this, the performance of a *párvana* rite, by the son of both fathers, on the death of either, even is shewn. n the same manner, by parity of reason, where there may be a diversity of mothers, the sires of the natural mothers are first designated by a son, who is son to two fathers, at the funeral repast (suggested by the passage subjoined) in honor of the maternal grandfathers: subsequently, the sires of her, who is the adoptive mother—"Where the paternal sires are honored, there certainly are the maternal."—*Dat. Ch.*, Sect. III, § 14—16.

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SECTION V.

Succession, &c., of Adopted Sons.

Vyavasthá. **417.** Deprived of the inheritance of his natural parents and their relations, a given *(dattaka)* son is entitled to inherit from his adoptive father.*

Vide Precedents, pages 609—648.

Authority. Manu:—"A given son must never claim the family and estate of his natural father. The funeral cake follows the family and estate; but of him, who has given away his son, the obsequies fail."

Exposition & Authority. 'The given son must never claim his natural father's family and estate.' Thus, 'the obsequies,'—that is, the funeral repast (which would have been) performed by the son given, fails of him, who has given away his son. The author of the *Chandriká* thus explains: 'By this it is declared, that by the act alone, creating the filial relation, property of the son given, in the estate of his adopter, is established, and connection to him as belonging to the same family ensues. But through extinction of the filial relation, from the mere gift, the property of the son given, in the estate of the giver, is extinguished, and connection to the family of the giver annulled.—*Dat. Mím.*, Sect. VI, § 6—8. *Vide Dat. Ch.*, Sect. II, § 18—20.

Authority. By this text—"Of the man, to whom a son has been given, adorned with every virtue, he even, shall take the heritage, though duly brought from a different family,"—

Annotations.

417. The adopted son not only inherits of his adoptive father, but likewise lineally and collaterally of the near and distant kinsmen of that person.—Sutherland's Synopsis, Head Fourth.

The adoption being the substitution for a son begotten, its effect is, by transferring the adopted from his own family, to constitute him son to the adopter, with consequent exchange of right and duties. Of these, the principal are the right of succession to the adopter on the one hand, and co-relative duty of performing for him his last obequies on the other.—Stra. H. L., Vol. I, p. 97.

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* See the annotations at pages 363, 364.

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MANU has declared on defect of the real legitimate son, the succession [of the son given,] to the whole heritage.—*Dat. Mím.*, Sect. V, § 44.

The assumption either of the family name or estate, is the ground of the claim; that failing, the son's right to offer a funeral cake to the natural parent fails: his participation in the family and estate of his adoptive father is a true ground of claim, since he may assert the right of offering a funeral cake *to his parent.* It follows, that the son given claims the family and estate of his adoptive father. The same remark is made by RAGHU-NANDANA in the *Udváha-tattwa:* "it appears that the son given shall claim the family and estate of the adoptive father alone, since he cannot assume the family name and estate of his natural parent, nor perform his obsequies, which are signified by the terms—funeral cake, and funeral oblation." RAGHU-NANDANA explains the word '*Swadhá,*' an oblation to be eaten by progenitors, thus, 'of him, who has given away his son, that is, of the natural father, (for this is the nearest term,) the funeral cake, or oblation to be eaten by progenitors, is extinct: it follows of course, that the funeral cake shall be offered to the adoptive father.'—*Coleb.* Dig., Vol. III, p. 268. Authority.

Consequently, he who is adopted as a son given, has a right to possess the inheritance and perform obsequies, although there be another nephew. He becomes the son of the adopter under the rule of VISHNU:—"He is son of him to whom he is given by his father and mother."—*Ibid.* Authority.

It is the universal opinion of the Hindú Jurists that, at the moment permission to adopt was pronounced, it had the same effect as if a child had been conceived in the womb of the woman, and her intention to adopt under the permission operated to all intents and purposes, as if she were *enceinte;* and that the boy subsequently adopted by her had all the rights of a posthumous son.—This opinion has received corroboration from the pen of Mr. H. Colebrooke, who is followed by Sir. Thomas Strange and others. Although in reality, the receiving of such permission by a woman from her husband does not coincide with pregnancy, (for had it been so, the acts performable under that permission would always correspond, and would have been done in accordance, with pregnancy; that is to say, a son would be adopted neither long before nor long after the time for giving birth to a child, but just on the expiry of the period of gestation, nor would a boy born before the date of permission or long after the period of gestation, be adopted, and not to adopt a son would be impossible,) yet its effect is the same as is justly declared by the learned lawyers aforesaid. Consequently,— Remark.

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Vyavasthá. **418.** The boy adopted by a widow under authority from her husband after his death has all the rights of a posthumous son.—So that,

Vide Precedents, pages 609, 610, 645.

Vyavasthá. **419.** On the death of the owner his wife like a pregnant widow can take his property for the behoof of the son to be adopted, and until his attaining majority, she can hold it as mother and guardian.—Consequently,

Vide Precedents, pages 609, 610, 646.

Vyavasthá. **420.** Even before his adoption, a sale or other disposition of his to-be father's property will not be valid unless made under circumstances of inevitable necessity, or a calamity affecting the family, or for the good of the adopted.

Vide Precedents, pages 610, 614.

Vyavasthá. **421.** But, if authorised by her late husband, a widow may exercise any power over the property left by him, notwithstanding she had permission to adopt.

Annotations.

418, 419. An adoption by a widow divests the widow of her estate *ipso facto.* She becomes guardian and trustee for the infant adopted.—Norton's Leading Cases, Part I, page 95.

420. A boy adopted by a widow with the permission of her late husband has all the rights of a posthumous son, so that a sale made by her to the prejudice of her late husband's property, even before the adoption, will not be valid, unless made under circumstances of inevitable necessity.—Macn. H. L., Vol. I, p. 70.

Should it have devolved upon a widow to adopt, her husband's estate descending to her on his death, adoption subsequent divests her succession, like the case of a posthumous child.—Stra. H. L., Vol. I, p. 101.

But the widow, in the above case, does not, and cannot, succeed to, but only receives, the property as a holder in trust. See Precedents, page 646 note.

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422. But where she is not so authorised, the adopted son is not precluded from questioning acts done by his adoptive mother. *Vyavasthá.*

Vide Precedents, pages 612, 613.

423. On the other hand, an adopted son is liable for the debts contracted by his adoptive mother under a necessity or calamity affecting the family, or for the benefit of that son, as also for the proper debts of his adoptive father. *Vyavasthá.*

Vide Precedents, pages 613, 614.

424. Where a legitimate *(ourasa)* son is born subsequently to the adoption, there the adopted son takes one-third, the legitimately begotten son being entitled to two-thirds. *Vyavasthá.*

Vide Precedents, pages 623, 643.

DEVALA.—All these sons are considered as heirs to one having no real legitimate son. But should a son be subsequently born, no right of primogeniture is attached to them. Of these, those who are equal in class, take a third share; *Authority.*

Annotations.

424. Where a legitimate son is born subsequent to the adoption, he and the son adopted inherit together; but the adopted son takes one-third, according to the law of Bengal, and one-fourth, according to the doctrine of other schools.—Macn. H. L., Vol. I, p. 70.

Mr. Sutherland, in the third special rule under HEAD FIFTH of his Synopsis, remarks:—"Where subsequent to an adoption legally made, a legitimate son is born to the adopter, the adopted son, at a division of heritage with such son, receives a quarter share according to the *Dattaka-chandrikā*." This finding of his does not, however, appear to be accurate, inasmuch as the doctrine of the *Dattaka-chandrikā* is, that an adopted son is entitled to one-fourth if not endued with eminent qualities, and to one-third if he is so; as is manifest from the passage subjoined:—"The rule for succeeding to a third share in the texts of DEVALA and KÁTYÁYANA, must be alleged to refer to a son given, endued with eminent qualities."—*Dat. Ch.*, Sect. V, § 19, 20. The above doctrine is also expressed by the learned gentleman himself in the following note written in reference to the remark in question.

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but those inferior in rank, should live in subjection to one of equal rank, receiving maintenance.—See *Dat. Ch.*, Sect. V., § 15.

Authority. KÁTYÁYANA.—"If a legitimate son be born, the rest are pronounced sharers of a third part; provided they belong to the same tribe; but if they be of a different class, they are entitled to food and raiment only." In some copies the reading is "are pronounced sharers of a fourth part."—*Dat. Ch.*, Sect. V, § 16.

Authority. In partition made between legitimate and the *dattaka* (son) and the rest,* the legitimate son has two shares, and those adopted sons who are of the same class with the father, take one share; but adopted sons belonging to an inferior class, are not entitled to any share: they need only be supported with food and raiment. NÁRADA declares (this:)—'All these sons are pronounced heirs of a man, who has no legitimate issue by himself begotten; but should a true legitimate son be afterwards born, they have no right of primogeniture: such among them as are of equal class, (with the father,) shall have a third part as their allotment, but those of a lower tribe must live dependent on him, supplied with food and raiment.'—*Dá. Kar. Sang., Sans.* p. 52.

Vyavasthá. **425.** Not only *one* legitimately begotten (*ourasa*) son, but also as many as there may be

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Annotations.

"*Receives a quarter share*"]—"This rule is founded on texts of VASHISHTHA and KÁTYÁYANA, the latter of which, however, is variously read. 'A third part' is substituted by some for the more prevalent reading, 'a fourth part:' the difference being adjusted with reference to the *qualities of the claimants.*" (Synopsis, Note xxii.) In the present *(kali)* age, however, it being impossible for persons to be endued with eminent qualities, such as are required by the law, it has been determined in the *Dáya-krama-sangraha*, one of the paramount authorities of the Bengal school, that a *dattaka* son is to take one-third in the division with a legitimately begotten son subsequently born; and this is followed here in practice.

425. If two legitimate sons are subsequently born, then, according to the Benares school, the property should be made into seven

* The original of this is "*dattaka-ádi*," the literal rendering whereof is as the above (viz., "*dattaka* and the rest,") but Mr. Wynhe has confusedly rendered it by "adopted sons."—See his *Da. Kra. Sang.*, Chap. VII, § 23.

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born subsequent to the adoption of a son, would take severally double the share of the adopted son, who in either case is entitled to one-half share of each of the former.

Authority.

SRÍ-DARA SWÁMÍ in his gloss on a verse of the *Bhágavata*, quotes a text of law on the benefit arising from a multitude of sons, to explain the motive for desiring many children, when a subsidiary son (is adopted) even though a principal one be living,—"Many sons are to be desired, that some one of them may travel to *Gayá*."—The adoption of a son given, although a son of the body be living, being thus valid, he shall have a third part as his share, in the same manner with a son given, subsequently to whose adoption a son of the body was born (according to the text of DEVALA cited).—*Coleb.* Dig., Vol. III, p. 390.

Explanation.

"Heirs"—that is, entitled to a full share. "Shall have as their share one-third of the property"—that is, they shall have as a share one-third part of that which is receivable by the son legally begotten. What shall be the share? Shall the son given receive four or three *suvarnas* out of twelve, which compose the share received by the son of the body? or shall the son of the body receive twice as much as is received by the son given? To this it is answered, if it be the meaning of the law that he shall take one-third part out of the share which is received by the son legally begotten, then what would be the consequence if there be many such? The son given would receive an excessive sum if he took a third part from each. Nor shall he take one share out of the collected wealth, for, though single, he would not receive a full third part, and the legitimate sons would have more (than their due allotments.) Neither is the second supposition right; for, were it so, he would take a quarter (instead of a third.) Thus the last supposition must be admitted.—*Ibid.*, pp. 390, 391.

Illustration.

It may be illustrated in this manner: in the case of partition made by a father, according to the opinion of JÍMÚTAVÁHANA and the rest, let two sons legally begotten take eight *suvarnas* each out of thirty-six inherited from a paternal

Annotations.

parts, of which the legitimate sons would take six, and, according to the law as current elsewhere, into five shares, of which the legitimate sons would take four, and so on in the same proportion, whatever number of legitimate sons may be born subsequently.—Macn. H. L., Vol. I, p. 70.

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grandfather, let the father take sixteen *suvarnas*, and the son given four. The meaning of the text is, that an adopted son shall have a third part of the share appertaining to a son legally begotten.—*Coleb.* Dig., Vol. III, p. 291.

Remark. The foregoing exposition of JAGANNÁTHA is not correct, as regards the extent of an adopted son's share in the division with a legitimately begotten son, who in Bengal takes two-thirds of the heritage, giving the adopted son the remaining third, as laid down in the above quoted passage of the *Dáya-krama-sangraha*, and not one-third part of the share appertaining to a son legally begotten, as in the latter case, the property must be divided into four, and not into three, parts; it is also wrong as regards the succession of an adopted son, received after the birth of a legitimately begotten one, inasmuch as the adoption, during the existence of a legitimately begotten son, being invalid and void *ab-initio*, (See *ante*, p. 767 *et seq.*,) the boy so adopted has no title whatever to succeed to the property of his so called adopter. As to the text on the ground of which the above opinion was advanced, it is applicable to sons legitimately begotten, and not to those adopted.—See the Privy council decision which is in strict accordance with the Hindú law, at pages 443, 446 of the Precedents.

Vyavasthá. **426.** If a person die before his father, leaving his wife authorised to adopt, the son adopted by the widow is doubtless entitled to inherit the property of his adoptive father;—he would also be entitled to inherit from his adoptive grandfather, provided he was adopted with his knowledge and assent—non-prohibition is assent.

Vide Precedents, pages 615, 619.

Annotations.

426. In the case of a *Hindu* of Bengal dying in his father's lifetime without issue, but leaving a widow authorised to adopt a son, if such adoption be made by the widow, with the knowledge and consent of her husband's father, at any time before he shall have made any other legal disposition of the property, or a son shall have been born to his daughter in wedlock, no such subsequent disposition or birth shall invalidate the claim of the son so adopted to the inheritance.—Macn. H. L., Vol. I, pp, 70, 71.

The latter part of the above observation of Sir. W. Macnaghten's does not appear to be accurate; because, if the birth of a daughter's son cannot invalidate the claim of a son's son subsequently born, neither can it invalidate the claim of a son's adopted son subsequently received.

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On account of the maxim:—"The intention of another, not prohibited, is sanctioned.—*Dat. Ch.*, Sect. i, § 32.

It is a rule that not to forbid is to assent.—*Coleb. Dig.*, Vol. II, p. 106.

Remark.

The author of the *Dattaka-Mímánsá* holds that, in the case of the adopted son being possessed of good qualities, and the legitimately begotten son destitute of the same, they share equally* :—This rule, however, is now quite inapplicable, adopted sons, possessed of good qualities such as are required by the law, being rare at the present *(kali)* age.†

Vyavasthá.

427. If there be a legitimately begotten son, the *dattaka* son of a king is not entitled to be invested with empire, although he may have his share in the same.

Vyavasthá.

428. But if there be no son legitimately begotten, the *dattaka* is certainly entitled to be invested with empire.

Authority.

The non-appointment to empire of the son of the twice married woman, and the other two, which is directed in the latter part of this quotation, holds, even on default of any other son, besides the legitimate son. For, this part of the passage is subjoined as an exception to the preceding part, ("on failure of the first would be respectively, &c.") and their non-succession to the empire, should a legitimate son exist, was declared in this preceding passage:—"A legitimate son existing, let not the king invest with empire, the wife's son, and the rest, (nor) cause to be completed (through) such sons the solemnities for his forefathers."—*Dat. Mím.* Sect., IV. § 26.

Explanation.

The meaning is,—'A legitimate son existing, let him not invest with empire the son of the wife, and the rest; (nor) cause to be completed, that is, nor cause to be performed (by such inferior sons) the solemnities, meaning the funeral repast and other rites, in honor of his forefathers.—*Ibid.*, § 27.

Authority.

But, although the son of the wife, the son given, and the rest may succeed to the general estate, their non-succession to the empire is advanced. Thus, it is ordained in the *Vedas*:—"The legitimate son, the son of the wife, the son given, the son made, the son of concealed birth, and the son rejected, take shares of the heritage. The son of an unmarried girl, the son of a pregnant bride, the son bought, the son of a twice married woman, the son self-given, and the slave's son: these six are contemptible, as

* See *Dat. Mím.*, Sect V. § 43.

† See the *dattaka* son's succession to the property of *Bandhus*.

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sons; on failure of the first in order respectively, let him invest the next with filial rights.—But let him not appoint to the empire the son of a twice married woman, nor a son self-given, nor one born of a female slave."—In the same authority also, "Let not the king invest with empire the wife's son and the rest, cause to be completed, through such sons, the solemnities for his forefathers, a legitimate son existing." It is replied—'if another ordinance of law exist, a special rule, for the sake of convenience, (must be construed) as conveying even the same meaning.' Therefore, the first passage cited,' which is declaratory of the right to succession, of the next in order, on failure of each preceding, extends even to the whole empire, as conforming with the texts of NÁRADA, and the rest, before mentioned: and the latter passage prohibits the equal participation, of the son of the wife, and the rest, if a legitimate son exist: or it refers to a son of the wife, and the rest, unequal in class: otherwise, it would be vexatious were adverse meanings deduced from each passage. If, however, this is admitted (and disregarded,) then (we allege) that, by the passage in question, the appropriate shares of the son of the wife, the son given, and the rest, respectively, are not forbidden, if a real legitimate son exist: but, the investing of such son with empire is ordained (by that author,) after having previously barred the same, in respect to those sons, in case of the existence of a real legitimate son. Thus the son of the wife, the son given, and the rest, receive the share prescribed for them by the general law. For grounds for, contracting the operation of the same are wanting: nor does the particular passage in question, obstruct its operation: for, that relates to a different object. Accordingly, their right to inherit is clearly laid down in the preceding passage,—"take shares of the heritage." Nor can it be said, they participate (merely) in the estate, other than the empire. For, the empire also is treated of in the passage in question. The exclusion of the son of the twice married woman, and the rest, from empire, although each preceding in order may have failed is in virtue of a distinct provision in respect to them.—*Dat. Ch.*, Sect. V, § 26, 28.

Remarks.

The mode, however, of partition, between the son of the wife, the son given, and the rest, and the legitimate son, which has been propounded in what preceded, does not apply to the *Shúdra* tribe; since, in the following texts of MANU and YÁJNAVALKYA respectively, a share, equal to that of the real legitimate son, is prescribed for the son, even by a female slave, of a man of the class in question, and the co-heirship, with the daughter's son, of such son, only when having no brother, is intimated: the equal partition of the son of the wife, the son given, and the rest, with the real legitimate son, while the father

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lives, and their succession to the moiety of the share of such son, where the father may be dead at the time of partition, follow *a fortiori*.—And otherwise, there would be a great inconsistency, if, where the son of the wife, the son given and the rest, took the fourth of the share of the legitimate son, the son by a female slave, whose title is infinitely inferior in respect to these, were to take an equal share with the legitimate son. MANU:—"but a son, begotten by a man of the servile class, on his female slave, or on the female slave of his male slave, may, by permission, take a share of the heritage. Thus is the law established." YÁJNAVALKYA:—"Even a son begotten by a *Shúdra* on a female slave, may take a share by the father's choice. But if the father be dead the brethren should make him partaker of the moiety of a share, and one who has no brothers, may inherit the whole property; in default of daughter's sons." If according to this authority, where there may be no son of the wife, and the rest, but there may be a wife and daughter, the daughter's son be entitled to share, (with the son by a female slave,) the rule for the succession of the daughter (or other proper heir) would be infringed; therefore, if any even, in the series of heirs down to the daughter's son exist, the son by a female slave does not take the whole estate, but on the contrary, shares equally with such heir. Accordingly, the text subjoined, must be construed as referring merely to the *Shúdras*:—"A son given being thus adopted, if by any chance a legitimate son should be born, let them be equal partakers of the father's estate." So also in the following text, the equal participation of all lawfully begotten *Shúdras* having been first propounded, the succession to equal shares, of the other sons likewise, is subsequently declared by the sentence, ("if there be a hundred sons") occurring therein. "For a *Shúdra* is ordained a wife of his own class and no other. Those begotten on her, shall have equal shares; if there be an hundred sons: (the same mode of partition shall obtain.") If the sentence in question be referred to the real legitimate son only, the position contained in it being obtained from what preceded, its repetition would be unmeaning.—Dat. Ch., Sect. V, § 29—32.

429. The *Dattaka* son is entitled to succeed to his adoptive mother's property, just as to that of his adoptive father,* and they inherit from him in default of heirs nearer than they. *Vyavasthá.*

Vide Precedents, pages 66, 614, 647, 648.

In consequence of the superiority of the husband, by his mere act of adoption, the filiation of the adopted son, as son of the wife, is complete in the same manner as her property, in any other thing accepted by the husband.—*Dat. Mím.*, Sect. I, § 22. Authority.

* See *ante*, pages 384, 385 and Precedents page 609.

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Whether or not a Dattaka son is entitled to inherit from a Bandhu.

Remarks. The twelve kinds of sons have been divided by the inspired legislators into two sets, each containing six sons; and the *Dattaka* son is included by some of them in the first set, and by others in the second. Those of the legislators who have arranged the *Dattaka* in the second set, have denied his heritable right to the property of any relation other than the adoptive father, whilst those who have placed him in the first set, have declared him entitled to inherit from his adoptive father and also from his relations. The subjoined are some of the texts in which the *Dattaka* or given son is placed in the second set:—

YAMA:—Sons are pronounced, by intelligent saints, to be twelve: of these, six are kinsmen and heirs; and six kinsmen, but not heirs. Those versed in the distinctions of class, declare, that the first is the one begotten by the man himself; the second, the son of the wife; the third, the son of the appointed daughter; the fourth, the son of the twice-married woman; the son of the unmarried daughter is considered the fifth, and the (sixth is) the son secretly born in the man's house. These six present funeral oblations.—The son deserted, and the one received with a pregnant bride, the son given, and the son made, and fifthly, the son purchased, and the son presented by himself: these six, whose filial relation proceeds from an overt act of acceptance, are kinsmen, but not heirs.—*Dat. Ch.*, Sect. V, § 3.

NÁRADA:—The real legitimate son; the son of the wife by appointment; the son of an appointed daughter; the son of an unmarried daughter; the son received with a pregnant bride; the son of hidden origin; the son of a twice-married woman; the deserted son; the son given; the son purchased; the son made also; and the one given by himself: these are declared to be the twelve descriptions of sons. Of these, six are heirs to kinsmen, and six not heirs to kinsmen.—Each, according to priority in order, is considered as superior; and the last successively as inferior. On the death of the father, according to their order, they succeed to his estate. On defect of each preceding more worthy, let the next less worthy son obtain the estate.—*Ibid.* § 4.

SANKHA and LIKHITA:—A son rejected *by his father or mother*, the son of a pregnant bride, a son given *by his natural parents*, a son bought, a son by a *Shúdra*, and a son self-given: these six sons are not heirs *to collaterals*,

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nor to their own father jointly with other sons.—There is an alternative in respect of partition among those who are heirs; the son begotten in lawful wedlock, the son of a wife begotten *by a kinsman,* the son of an appointed daughter, the son by a woman twice-married, the son of a young woman unmarried, and a son of concealed birth, are six kinsmen and heirs, who belong to the same race with their fathers and paternal grandfathers, *who jointly inherit* the estate, and offer funeral cakes, and *who claim affinity* with *sapindus.*—See *Coleb.* Dig., Vol. III, pp. 151 and 152.

HÁRÍTA:—"The son begotten by the man himself, the son of the wife, the son of the twice-married woman, the son of the appointed daughter, and the son of hidden origin, are kinsmen and heirs.—The son given, and the son purchased, the son deserted, the son received with a pregnant bride, the son self-given, and the son any how obtained, are heirs, not kinsmen."—*Dat. Ch.*, Sect. V., § 10. See *Coleb.* Dig., Vol. III, p. 152.

DEVALA, having recited the real legitimate son, the son of an appointed daughter, the wife's son, the son of an unmarried woman, the son of secret origin, the deserted son, the son received with a pregnant bride, the son of a twice-married woman, the son given, the son self-given, the son made, the son purchased, adds:—"These twelve are pronounced sons, for the sake of issue: some are sprung from himself; some from another also; some acquired by (an overt act of adoption): and others filially related independent thereof. Of these, the first six are kinsmen and heirs (to collaterals,) the rest are so merely to the father.—*Vide Dat. Ch.*, Sect. V, para. 15.

Some of the texts which contain the *dattaka* son in the first set, and recognize his heritable right in the property of the relations as well as in that of the adoptive father, are the following:— Remarks.

MANU:—Of the twelve sons of men, whom MANU, sprung from the Self-existent, has named, six are kinsmen and heirs; six not heirs, but kinsmen.—The son begotten by a man himself, the son of the wife, the son given, the son made, a son of concealed birth, and a son rejected, are the six kinsmen and heirs.—The son of an unmarried daughter, the son of a pregnant bride, the son bought, the son of a twice-married woman, the son self-given, and the son by a *Shúdra,* are the six kinsmen, but not heirs.—See *Dat. Ch.*, Sect. V, § 11.

BOUDHÁYANA:—"He pronounces the real legitimate son, the son of an appointed daughter, the wife's son, the sons

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given and made, the son of concealed origin, and the deserted son also, participators in the estate;—the son of an unmarried daughter, the son received with a pregnant bride, the son bought, the son of a twice-married woman, also the son self-given, and the *Nisháda*, or son of a *Shúdra*, he pronounces partakers of the family."—*Dat. Ch.*, Sect. V, § 12.

GOUTAMA:—The son begotten by a man himself *in lawful wedlock*, the son of the wife *begotten by an appointed kinsman*, a son given, a son made *by adoption*, a son of concealed birth, and one rejected by his natural parents, are sons who inherit property.—The son of an unmarried girl, the son of a pregnant bride, a son by a twice-married woman, the son of an appointed daughter, a son self-given, and a son bought, claim the family of their adoptive fathers, and a fourth part of *the paternal estate*, if there be no son begotten in lawful wedlock, nor other *superior claimant*.—See *Coleb.* Dig., Vol. III, p. 150.

Káliká-purána:—The son begotten by a man himself in lawful wedlock, the son begotten on his wife *by a kinsman*, a son given *by his natural parents*, a son made *by adoption*, a son of concealed birth, and a son rejected, take shares of the heritage.—The son of an unmarried girl, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a *Shúdra*, are six sons who are *contemptible* as dust.—See *Coleb. Dig.*, Vol. III, p. 156.

Remark. Thus in the texts of YAMA, NÁRADA, SANKHA, LIKHITA, HÁRÍTA, and DEVALA, the *dattaka son* is declared to be only a kinsman; while in those of MANU, BOUDHÁYANA, GOUTAMA and the *Káliká-purána*, he is recognised to be an heir as well as a kinsman. Although it may appear on a cursory view that, the purport of the texts of YAMA and the rest is contradictory to that of MANU, (and, as such, they are not to be respected, for 'MANU held the first rank among legislators, because he had expressed in his code the whole sense of the *Veda*; and no code was approved, which contradicted MANU*), yet such is not really the case; as it will be seen that such seeming contradiction has been reconciled by the authors of digests and commentaries. The reconciliation, however, has been made principally in two ways.

* See *ante*, page 289, Preface to MANU, page xii, and Precedents page 647.

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One of which is,—that the author of the *Dattaka-chandriká* decided that the *dattaka* son is entitled or not entitled to inherit from a *bandhu* according as he is endued or not endued with good qualities, by saying—"The doctrines of one holy saint,—'that the son given is an heir to kinsmen,' and that of another, 'that he is not such heir,'—are to be reconciled by referring to the distinction of being endued with good qualities, or otherwise. By reason of succeeding to the estate of *sapinda* kinsmen, as well as to that of the father, he is (argued by the one to be) heir to kinsmen: and on account of the particle 'only' in the phrase 'of the father only,' (occuring in the passage subjoined,) from inheriting merely of the father, he is (argued by the other, not to be) such heir. 'Of these, the first six are heirs to kinsmen: the other six of the father only.' And thus (the objection of) variation, from the son given being enumerated higher and lower in the order of inheritance, and so forth, by different holy saints respectively, is obviated, by the distinction as to his qualities, good and bad."—*Dat. Ch.*, Sect. V, paras. 22, 23. Reconciliation

According to the above doctrine, a *dattaka* son endued with transcendent qualities is entitled to inherit from a *bandhu* as well as father. But a *dattaka* son endued with transcendent qualities (as required by the law) being rare in the present *(Kali)* age, the above reconciliation is of no use at the present time.—(See post p. 401, and Precedents pp. 618, 619.) Remark.

The author of the *Viráda-bhangárnava* says also the same thing, *viz.*,—"A question here occurs for discussion: can a son given be heir to a kinsman, or not? On this point some lawyers affirm, that the right of the son given to inherit from a kinsman, which is mentioned by MANU and BOUDHÁYANA, and his superior rank, as declared by GOUTAMA, VRIHASPATI, and *Káliká-purána*, must be considered as relating to a son given, who is endued with transcendent good qualities: for the expressions used in the text of VRIHASPATI, 'pure by class, and irreproachable by their conduct,' denote transcendent good qualities: pure signifies 'absolved from all guilt;'—by acts of religion, by alms, by study of Scripture, and by sacrifices, men become pure, or are absolved from all guilt. A text of MANU, (*viz.*:—'Of the man to whom a son has been given, adorned with every quality,* *that* son shall take the heritage, though brought from a different family') shows that a son given being endued with every virtue, shall take the heritage.—*Coleb.* Dig., Vol. III, p. 270.

* With every quality, class, science, and observance of duties.—*Dat. Ch.*, Sect. V, § 20.

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Reconciliation. The other reconciliation is by way of interpretation of the foregoing texts of MANU given by KULLÚKA BHATTA, the celebrated commentator of his Institutes. The same is as follows:—"Among the twelve sons, who are spoken of by MANU, the son of BRAHMÁ, the first six are kinsmen and heirs to the relations of the same race *(gotra)*;* consequently, as kinsmen, they offer oblation-cakes, water, and so forth to *sapindas*, and *samánodakas*,† and, in default of the nearer (heir,) they succeed to the heritage of the relations of the same race; for it will be declared that the twelve descriptions of sons, without any exception, inherit the estate of their father. The last six do not take the heritage of their relations of the same race but become kinsmen, and, as such, they perform the duties of kinsmen that is, offer the oblation of food, libation of water, and so forth."‡—Commentary on MANU, Ch. IX, *v.* 158.

VIJNÁNESHWARA has laid down almost the same doctrine. He says:—"MANU, having premised two sets of six sons, declares the first six to be heirs and kinsmen; and the last to be, not heirs, but kinsmen: 'The true legitimate issue, the son of a wife, a *son given* and one made by adoption, a son of concealed origin, and one rejected (by his parents,) are the six heirs and kinsmen. The son of an unmarried woman, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a *Shúdra* woman, are six not heirs but kinsmen.'—That must be expounded as signifying that the first six may take the heritage of their father's collateral kinsmen (*sapindas* and *samánodakas*); if there be no nearer heir, but not so the last six.—*Mitáksh.*, Chap. I, Sect. II, § 30, 31, p. 317.

The commentator of the *Dattaka-chandriká* has, in his Synopsis,§ exclusively adopted the above doctrine of KULLÚKA BHATTA, and stated how KULLÚKA BHATTA has, by the above

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* See *ante*, page 174. † See *ante*, pages 102, 103.

‡ The above Commentary is quoted from the Institutes of MANU, published under the authority of the Committee of Public Instruction.—Although the reading of the Commentary on the above text of MANU as quoted in the *Vivâda-bhangárnava*, and translated by Mr. Colebrooke, is somewhat different from that of the Commentary in question, yet both are of the same purport and result. The translation of the latter Commentary is as follows:—MANU, sprung from the Self-existent BRAHMÁ, and first of the fourteen MANUS: among those twelve sons of men whom he has named, the first six are pronounced as kinsmen and heirs to collaterals: the result is, that, as kinsmen, they offer the funeral cakes and water to *sapindas* and *samánodakas*; as heirs, they succeed to the heritage of their collateral relations on failure of male issue, as well as to the estate of their own father. The last six may not take the heritage of any except their own father; but they participate in his wealth, for it is declared generally without any exception, that sons inherit the estate of their father."—*Coleb. Dig.*, Vol. III, p. 146.

§ Pages 5 and 6.

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interpretation, reconciled the apparently discrepant texts of the sages. Thus, "As a *dattaka* son is entitled to inherit from his (adoptive) father, so is he entitled to the property of his maternal grandfather and the other *bandhus* or cognates: this is according to the doctrine of the *Dattaka-chandriká*.* But (although) many of the sages have included the *dattaka* son amongst the last six sons, yet MANU, who held the first rank amongst legislators, having included him among the first six, the commentators and writers of digests have come to the decision that a *dattaka* son is entitled to inherit from those *bandhus* who belong to the *gotra* or race to which his adoptive father belonged: he shall not be entitled to the property of the *bandhus* of a different race, (such as) the maternal grandfather and the rest. This decision has reconciled all the texts and received corroboration by the Courts of Justice.† Those legislators who declared the *dattaka* son not entitled to the property of *bandhus*, must have meant the *bandhus* of a different *gotra* or race, that is, the maternal grandfather and the like. And the other legislators, who declared the *dattaka* son to be entitled to the property of *bandhus*, must have meant them to be such *bandhus*, as are of the same *gotra*, (*viz.*,) the paternal grandfather, brother, and the rest. For authority whereof, see MANU (Sanskrit,) page 14, *verse* 158."‡

So, according to the interpretation given by KULLÚKA BHATTA and the exposition by VIJNÁNESHWARA, as also according to the doctrine of other authors and writers.

430. A *dattaka* or given son is entitled to inherit both lineally and collaterally, that is, from

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Annotations.

365. The right attaches to the entire property of the adopter, real and personal, and, in the form under consideration, the *dattaka*, it operates lineally and collaterally.—Stra. H. L., Vol. I, p. 97.

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* By 'a *dattaka* son, entitled to inherit from a *bandhu*,' is, however, meant in the *Dattaka-chandriká*, the son who may be endowed with good qualities; inasmuch as the commentator, for his authority, refers to line 20, page 30 of the Sanskrit *Dattaka-chandriká*, published by himself, but this line, (the translation whereof is 'Therefore, by the same relationship of brother, and so forth, in virtue of which the real legitimate son should succeed to the estate of a brother or other kinsmen, where such son may not exist, the adopted son takes the whole estate even') is the consequential clause of the lines 18 and 19 just above it, wherein the title and non-title of a *dattaka* son is recognised, in accordance with his being endowed with good or bad qualities. See *Dat. Chan.*, Sect. V, § 22, 23.

† *Vide* Precedents, pages 624, 625.

‡ By this he alludes to the interpretation or reconciliation by KULLÚKA-BHATTA already given at page 398.

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ancestors in the direct male line and their male descendants.

Vide Precedents, pages 66, 475, 476, 615—622, 641, 646, and 647.

Remark. Sir William Macnaghten has adopted the above doctrine, by saying :—"Another point, which has been the subject of much discussion is, as to whether an adopted son by the *dattaka* form succeeds collaterally as well as lineally; but this may now be fairly said to be set at rest, and decided in the affirmative. It is true that JIMÚTA-VÁHANA in the *Dáyabhága*, has contended that, the son adopted in the *dattaka* form cannot succeed to the property of his adopting father's relations; but the doctrine, being in opposition to the text of MANU, cannot be held to be entitled to any weight."—Macn. H. L., Vol. I, p. 78.

Remark. Then arises the question whether a *dattaka* son is entitled to inherit from a cognate, or relation belonging to a different *gotra*? None of the two paramount authorities, *viz.*, the *Dattaka-chandriká* and *Dattaka-mímánsá*, nor any of the other authorities on the subject of adoption, has expressly laid down anything on the subject. Now if the legal maxim—'*expressio unius est exclusio alterius*'—be applicable to the above interpretation of MANU's texts by KULLÚKA BHATTA, and to the above exposition of the same texts by VIJNÁNESHWARA, both of whom are very high authorities, then according to their doctrine, a *dattaka* son is not entitled to inherit from a cognate. The Hindu Jurists among whom is included the learned commentator of the *Dattaka-mimansá* and *Dattaka-chandriká*, and the author of the *Dattaka-koumudí* hold the above to be *the* doctrine of the said two authorities and maintain the same to be the settled law on the point. The above doctrine was also adopted by the late Sudder Dewany Adawlut in their judgment in a case decided in conformity with the *Vyavasthá* delivered by their *Pandits* so far back as the year 1821. This judgment and doctrine were subsequently strengthened by the pen of no less an authority than Sir William Macnaghten, who alluding to the above judgment or decision expressed his own opinion in the terms following :—"It should be observed, however, that a son so adopted, has no claim to the property of a *bandhu* or cognate relation: for instance, if a woman on whom her father's property had devolved, adopt a son with the permission of her husband, the son, so adopted, will not be entitled to such estate, on his adopting mother's death. It will go to her father's brother's son in default of nearer heirs. This point was determined in a case* by

* *Gunga Mya* versus *Kisken Kishore*, and others.—Sel. S. D. A. Rep., Vol. III, p. 128, *Vide* Precedents, pages 624, 625.

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the Court of Sudder Dewany Adawlut. It is not quite evident why a daughter's adopted son should be excluded from inheriting the estate of his adopting mother's father, while a son's adopted son's right of succeeding collaterally has been acknowledged, inasmuch as the maternal grandfather is enumerated among the kindred by all the Hindú legislators: but the reason is, that the party adopted in the latter case becomes the son of a person whose lineage is distinct from that of the maternal grandfather."—Macn. H. L., Vol. I, pp. 77, 78.

"The difference of opinions existing as to whether a *dattaka* should be considered as heir to the adopter's kinsmen or not, arises from a difference in the order of enumeration in the twelve descriptions of sons; some legislators maintaining that MANU included the *dattaka* among the first six, who are entitled to inherit collaterally, while others maintain that the same lawgiver ranked him among the last six, who can only inherit lineally.* In the *Dwaita-nirnoya* the several opinions have been noticed, and the author of that work gives his own in favor of the *dattaka*. In Sir William Jones's translation of the Institutes of MANU, the *dattaka* is ranked among the first six; and a great majority of *Pandits* throughout the country who were consulted on the subject when it was agitated in the Supreme Court, expressed their opinion, that the *dattaka* is entitled to inherit *collaterally*. The author of the *Dattaka-chandriká*, according to his usual expedient of reconciling conflicting doctrines, puts the decision of the question on the character of the claimant—a criterion, it must be confessed, not very precise."—*Ibid.*, p. 79.

Afterwards, in 1863, the aforesaid decision was confirmed by a Full Bench of the High Court of Calcutta in a case in which the Hon'ble Judges approving of the doctrine inculcated by the Hindú Jurists and adopted by Sir William Macnaghten, held that 'an adopted son cannot succeed to his adoptive maternal grandfather's estate, when there are collateral male heirs.'† Then in 1876 the High Court of Allahabad in contravention of the above doctrine as well as of the decisions inculcating the same, has, in its judgment in *Sham-Kuar* versus *Gya-din*,‡ held that 'an adopted son under the *Dattaka-mímánsá* and *Mitáksharás* succeeds to property to which his adoptive mother succeeded as the heiress of her father.'

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* See *ante*, pages 394, 395.

† *Vide* Precedents, page 625.

‡ *Vide* Precedents, page 630.

§ See, however, *ante* page 398.

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In imitation of the last mentioned decision, and in contravention of its own Full Bench Ruling in *Morun Moee Debea* v. *Bijoy Krishna Goswámí*,* the High Court of Calcutta, has recently made two decisions. The first, in the case of *Puddo Koomaree Debee* v. *Juggut Kishore Acharjee*, in which it has been held that 'the rights of an adopted son, unless curtailed by express texts, are in every respect similar to those of the natural born son; that the adopted son succeeds to the *sapinda* kinsmen of his father; and as regards the relationship of *sapinda*, there is no difference between the adopted and the natural born son;'† and the second, in the case of *Uma Shanker Moitra* v. *Kali Komul Mozumdar*, in which it has been held that 'according to Hindú law, an adopted son takes by inheritance from the relatives of his adoptive mother in the same way as a legitimate son.'‡

Remarks.

With great deference to the Honorable Judges who passed the last two decisions, it is submitted that they do not appear to be in accordance with the settled law of the Bengal school, notwithstanding the cases, in which those decisions are made, are of Bengal proper. In the first place, it is not in accordance with the *Dattaka-chandriká*, which is the highest authority of the Bengal school in the matter of adoption, and which recognizes the heritable right of an adopted son in the property of his adoptive mother's relatives, solely by reason of his being endued with good qualities; but such good qualities as entitle an adopted son to be heir to those relatives being rare in the present *(kali)* age, it has been concluded that according to the *Dattaka-chandriká*, an adopted son does not inherit from a cognate kindred.§ The Honorable Judge who wrote the judgment in the last case has nevertheless held that, according to the *Dattaka-chandriká*, an adopted son is entitled to inherit from the relatives of his adoptive mother on the ground of his performing their *shráddhas* or presenting oblations to them, though the *Dattaka-chandriká* does not at all recognize the adopted son's heritable right upon that ground.§ True, it lays down that—'the absolutely adopted son presents oblations to the father and other ancestors of his adoptive mother only;'—but it nowhere says that he is entitled to inherit from them by reason of presenting oblations to their *manes*. Had its doctrine been so, then it would not have laid down that 'a *Dattaka* son's right to inherit from kinsmen is upon his being endued with good qualities,'§ thereby leaving to implication that he does not inherit from them by reason of presenting oblations to them. The learned Judge has, in his elaborate judgment, quoted the passage of the *Dattaka-chandriká* in which the above doctrine is inculcated, but has

* See Precedents, page 625.
† See Precedents, page 640.
‡ See Precedents, page 631.
§ See *ante*, pages 397 and 401.

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silently passed it over* laying stress solely upon the ground of his (the *dattaka* son's) presenting oblations to the relatives of his adoptive mother —a ground not at all recognized (but impliedly rejected) by that authority. In the second place, the above decision is neither in accordance with the *Dáya-bhága*, which recognizes an adopted son's right to inherit *only* from his adoptive father, nor with KULLÚKA-BHATTA'S exposition, which (latter) is recognized by all the subsequent authors and writers to be the settled law of the Bengal school on the point in question.†

As the Honorable Judge founds the adopted son's right to the property of the relatives of his adoptive mother solely upon the ground of his performing *shráddhas* to them, so let us see what effect is given to the above by the authorities of this (Bengal) school. The same will appear from the subjoined passages :—

ATRI says,—"By a man destitute of a son only, must a substitute for the same always be adopted, with some one resource, for the sake of funeral cake, water and solemn rites."—*Dat. Mím.*, Sect. i § 3.

'By a man destitute of a son.'] From the masculine gender being here used, it follows that a *woman is incompetent* (*to adopt*). Accordingly VASHISHTHA ordains : "Let not a woman either give, or receive, a son in adoption, unless with the assent of her husband."—*Ibid.*, § 15.

'Nor let a woman accept a son (without the assent of her husband.')—If a son be accepted by a woman without the assent of her husband, her property in that child is valid, but not his performance of filial duties : he can neither possess the heritage, nor offer the *shráddha*, or the like ; for, it is shown that the adoption of a son is the act of the *man ;* in no code of law is it found that adoption can be the act of the woman.—*Coleb.* Dig., Vol. III, p. 244.

MANU also:—"A son of any description must be anxiously adopted by one who has none, for the sake of the funeral cake, water, and solemn rites, and for the celebrity of *his* name."—*Dat. Mím.*, Sect. I, § 9.

Males only need sons to relieve them from the debt due to ancestors.—*Coleb.* Dig., Vol. III, p. 253.

And it is recorded in the *Mahábhárata* and other works, that JARATKÁRA *Rishi*, and other males have taken wives for the sake of obtaining male issue, but it is nowhere said that a *woman* has taken a husband for that purpose.—*Ibid.*, p. 53.

The better reason, therefore, perhaps is that the necessity for a son to celebrate the funeral rites regards the *man* rather than

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* *Vide* precedents, pages 635, 636. † See *ante*, pages 298, 399, 400, 401.

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the woman, who depends less for redemption upon such means, so that wherever a woman, duly authorized, adopts, it is on her husband's account, and for his sake, not her own.—Stra. H. L., Vol. I, p. 67.

It is abundantly clear from the authorities above quoted, that males only need sons, and are competent to adopt sons, to present oblation of food and libation of water to the *manes* of themselves and their forefathers, and to continue their lineage, and not females, who depend less for redemption upon such means, as they can ascend to heaven though they have no children, if they devote themselves to pious austerity;* and that adoption is the act of a man, and not of a woman who, when authorized by her husband, can perform the act, only as his substitute, and adopt a son to him, for the sake of presenting oblations, &c., to the *manes* of himself and his forefathers and continuing *his* lineage.

Then as regards the performance of *shráddhas* or presentation of oblations to the ancestors of the adoptive mother, upon which great stress is laid,—the learned Judge who wrote the above judgment being himself a Hindú is well aware that neither in Bengal, nor in any province of India, are *shráddhas* performed according to the *Dattaka-chandriká* and *Dattaka-mímánsá*, but, in Bengal proper, solely according to the *Shráddha-tattwa* of RAGHU-NANDANA, and in the other provinces generally according to the *Nirnoya-sindhu* of KAMALÁKARA † Now RAGHU-NANDANA, who is the paramount authority and sole guide of the Bengal school in the matter of religious acts, has laid down as follows:—"Accordingly in the double set of oblations *(párvana)* it is indispensably necessary that the son should perform the *shráddha* for the paternal line, and not for the line of his maternal grandfather: but it is simply reprehensible in one who performs *shráddha* for the paternal ancestors, not to perform it also for the maternal grandfather and his progenitors. Consequently, since the *shráddha* may be performed without noticing the maternal grandfather's line, in a subordinate double set of oblations, and the like, the *shráddha* for the maternal ancestors is not requisite to the completion of the obsequies performed in the dark fortnight of *A'swina.*" After quoting the above, JAGAN-NÁTHA has expressed his own opinion by saying,—"This observation of RAGHU-NANDANA and others is accurate."—See *Coleb.* Dig., Vol. III, p. 253.

Hence it is clear that, according to the *Shástra* of the Bengal school the presentation of oblations to the ancestors of the adoptive mother is rather nominal, and, as such, it cannot be the cause of heritable right in the estate of so-called maternal ancestors.

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* "A virtuous wife ascends to heaven, though she have no child, if after the decease of her lord, she devote herself, to pious austerity."—MANU, Chap. 5, *v.* 160. *Vide* Precedents, page 628.

† See Preface to the *Vyavasthá-chandriká*, and that to the present work.

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Besides, inheritability is not, in every case, a concomitant of the presentation of oblations;—for instance, sons of the daughters of a son and grandson present oblations to their (natural) maternal great-grandfather and great-great-grandfather, and yet they do not inherit from such ancestors. Further, had any person simply by presenting oblations been the heir of him to whom he offered them, then MANU and his followers would not have deemed it necessary to declare the first set of six sons including the *dattaka* to be kinsmen and (also) heirs,* inasmuch as the term 'kinsmen' alone would, in the above case, have been sufficient to imply that those sons are heirs in consequence of being kinsmen entitled to present oblations. But the settled law is this, that those persons only are heirs who are recognized and enumerated as such in the books of unquestionable authority.†

Regarding the succession of the adopted son, there is also uncertainty in the decision in question owing to its declaring in general terms that an adopted son is entitled to inherit from the relatives of his adoptive mother, and not definitely saying from the relatives of what description of adoptive mother, inasmuch as (1) if a woman adopt a son under authority from her husband, living or dead, (2) or if a man adopt a son in conjunction with his wife or one of his wives, in such cases, the woman becomes, doubtless, the adoptive mother of the son so adopted; but (3) where a man having numerous wives, and not authorizing any of them to adopt a son, himself adopted a son without allowing any of his wives to associate with him in the performance of the act, in that case also the author of the *Dattaka-mímánsá* considers all those wives to be adoptive mothers of the son so adopted by their husband as will be seen from the following passage:—"In consequence of the superiority of the husband, by his mere act of adoption, the filiation of the adopted as son of the wife is complete, in the same manner as her property, in any other thing, accepted by the husband." *Dattaka-mímánsá* Sect. i, § 22. So if, upon the assumption of such adopted son's presenting oblations to the ancestors of so-called adoptive mothers, he is meant by the decision in question to be heir to all such maternal relatives, then the natural legal heirs of those numerous persons must be deprived of their just rights. The above decision, therefore, ought to have definitely stated whether by 'adoptive mother' it meant the adopting wife or widow in the first and second cases, or in the third case also; if also in the third, then the decision under review, cannot but be regarded as being in contravention of the warning of our holy legislator VRIHASPATI, who says:—"A decision must not be made solely by having recourse to the letter of the written codes: since if no decision were made according to the reason of the law, there might be a failure of justice."‡

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* See *ante*, pages 395, 396. † See *ante*, pages 86—111.

‡ Coleb. Dig., Vol. II, p. 128—Macn. H. L., Vol. II, p. 102.

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Should it be alleged that the decision in question is according to the doctrine of the *Dattaka-mímánsá*, though not according to that of the *Dattaka-chandriká*, then it is humbly submitted that it ought not to have been so, as the latter, on the point in question, differs from the former; and the rule is that wherever those two authorities differ, the doctrine of the *Dattaka-chandriká* is to be adhered to in Bengal and Madras in preference to that of the *Dattaka-mímánsá*, which is preferably followed in the other provinces.*

In conclusion it is humbly submitted that the decision in question, being not only in contravention of the *Dattaka-chandriká*, *Dáya-bhága* and *Smriti-tattwa* of RAGHU-NANDANA, the paramount authorities of the Bengal school, but also in contravention of the exposition which is given by KULLÚKA BHATTA† (another paramount authority of the said school,) and which is adopted by the subsequent authors and writers as being the settled law on the point in question, is not regarded as being in accordance with the Hindú law of Bengal proper, while, on the other hand, the Full Bench decision in *Morun-moee Debea* v. *Bijoy-krishna Goswamí*, is considered as being in strict accordance with the law of this school.

Vyavasthá. **431.** If there exist another son of the proprietor, then the adopted son of his deceased son would get such share as an adopted son would have been entitled to.‡—*Dat. Ch.* Sans., p. 30.

Vyavasthá. **432.** Should there exist no son, the adopted son of the deceased son will take the whole estate.‡—*Ibid.*

'Since it is a restrictive rule, that a grandson succeeds to the appropriate share of his own father, the son given, where his adopter is the real legitimate son of the paternal grandfather, is entitled to an equal share even, with a

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* The *Mímánsá* and *Chandriká* are equally respected all over India; and wherever they differ, the doctrine of the latter is adhered to in Bengal and by the Southern jurists, while the former is held to be the infallible guide in the provinces of Mithila and Benares.—Macnaghten's Hindú law, Preliminary Remarks, page xxiii.

† See *ante*, page 398.

‡ The original of these two *Vyávasthás* is in the *Sanskrita Dattaka-chandriká*, and runs thus :—

४३१ । धनिनः पुत्रान्तर सत्त्वे मृतपितृकस्य दत्तक पौत्रस्यापि दत्तोचितांश भागित्वम् । द, च, ए, ३० ।

४३२ । तदसत्त्वे सर्व्वहरत्वमिति । द, च, ए, ३० ।

The English version of the above is not to be found in Mr. Sutherland's translation of the work. It must have been inadvertently omitted under the circumstance stated by him in his Preface.

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paternal uncle, who is also such description of son: therefore, a grandson, who is an adopted son, may (in all cases) inherit an equal share even with an uncle.'—This must not be alleged (as a general rule.) For there would be this discrepancy: where the father of the grandson were an adopted son, he would receive a fourth share; but the grandson, if he were such son [of him,] would receive an equal share [with an uncle in the heritage of the grandfather.] *Dat. Cha.*, Sect. v, § 25. Accordingly,—

433. Whatever share, may be established by law, for a father of the same description, as himself; to such appropriate share of his father does the individual in question (*viz.*, the adopted son of one adopted,) succeed. Thus what has been advanced, only is correct. The same rule is to be applied by inference to the great-grandson also.—*Dat. Cha.*, Sect. V, § 25. *Vyavasthá.*

Vide Precedents, pages 443, 620, 622, 640—642, 644.

434. The issue, natural or adopted, of an adopted son inherit collaterally as well as lineally. *Vyavasthá.*

Vide Precedents, pages 443, 620, 622, 640.

435. The right of the relations of a different race or races as well as of those of the same race to inherit from a *dattaka* has been expressly recognised by the dispensers of justice. *Vyavasthá.*

Vide Precedents, pages 175, 620, 642.

436. The adopted son of a *Shúdra* inherits in equal shares with the legitimately begotten son during the life-time of the adopter, but gets half of that son's share after the adopter's death. (See *ante*, pp. 23—25.) *Vyavasthá.*

Since, on the following texts of MANU and YÁJNAVALKYA respectively, a share, equal to that of the real legitimate son, is prescribed for the son even, by a female slave, of a man of the class in question; and the co-heirship, with the daughter's son, of such son, only when having no brother, is intimated; the equal partition of the son of the wife, the son given, and the rest, with the real legitimate son, whilst the father lives, and their succession to the moiety of the share of such son, where the father may be dead at the time of partition, follow *a fortiori*.—And otherwise, there

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would be a great inconsistency, if where the son of the wife, the son given, and the rest, took the fourth of the share of the legitimate son, the son by a female slave, whose title is infinitely inferior in respect to these, were to take an equal share, with the legitimate son. MANU:—"But a son, begotten by a man of the servile class, on his female slave, or on the female slave of his male slave, may, by permission, take a share of the heritage. Thus is the law established." YÁJNAVALKYA:—"Even a son, begotten by a *Shúdrá*, on a female slave, may take a share, by the father's choice. But if the father be dead, the brethren should make him partaker of the moiety of a share; and one who has no brothers, may inherit the whole property; on default of daughter's sons."—*Dat. Ch.*, Sect. V, para. 30.

SUCCESSION OF A DWYÁMUSHYÁYANA AND THE REST.

Vyavasthá. **437.** The son given, who is a *Dwyámushyáyana* (son of two fathers,)* if both his adoptive and natural fathers have no other male issue, takes the whole estate of both.—*Dat. Ch.*, Sect. V, § 33.

Vyavasthá. **438.** One adopted, where legitimate issue (of the adopter) existed, does not participate in the estate of the adopter.—*Ibid.*

Vyavasthá. **439.** But a legitimate son, being born, (to the natural father) subsequent to the adoption, the adopted son takes *out of the natural father's estate*† half of the share of a legitimate son. (If, however, such issue be subsequently born to the adopter, the adopted son in question) takes half of the share which is prescribed by law for an adopted son, exclusively related to his adoptive father, (where legitimate issue may be subsequently born to that person.)‡—*Ibid.*

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* See *ante*, pages 340—347.

† The portion in Italics is omitted in Mr. Sutherland's translation.

‡ Where, subsequent to an adoption legally made, a legitimate son is born to the adopter, the adopted son, at a division of the heritage with such son, receives a quarter share (but see *ante*, p. 387,) according to the *Dattakachandriká*. A distinction, however, obtains in the case of the *Dwyámushyána*. From an obscure part of that work it would appear to be the doctrine of its author, that such son would only take half the share to which the son, absolutely adopted, would be entitled, in participating with a legitimate son, subsequently born.—On the same principles, this author

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440. The son and son's son of a *Nitya-dwyà-mushyáyana* succeed also in the same manner. *Vyava sthá*

441. The children of an *Anitya-dwyámushyá-yana*, having no relation with the family of the adopter,* it is inferred, by analogy, as well as by equity, that they are not entitled to inherit from them. *Vyavasthá.*

442. The exclusively given sons and *Dwyà-mushyáyanas* adopted by persons blind, lame or otherwise disqualified from inheriting, and so forth, *Vyavasthá.*

Annotations.

442. Adoption by one, being himself through any of the operative causes, incapable of inheriting, seems to be of a qualified nature, not entitling the adopted to the full rights of his condition. —Stra. H. L., Vol. I, p. 77.

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appears to provide that, where legitimate issue is subsequently born to the natural father, the *Dwyámushyáyana* only takes, in the estate of such father, the half of the share of a legitimate son.—Sutherland's Synopsis, Head Fifth, page 154.

Sir William Macnaghten says:—"With a legitimate son subsequently born, the *Dwyámushyáyana* takes half a share of his adopting father's property" (Vol. I, p. 71); and as authority for the same, he refers to the *Dattaka-chandriká* (Sect. V. § 33,) that is, the *Vyvasthá's* Nos. 437, 438 and 439, quoted herein-above, on reference to which it appears that the above dictum of the learned gentleman is erroneous, and not in conformity with the passage in question that a legitimate son being subsequently born, the *Dwyámushyáyana* does not inherit half of the whole estate of the adopter, but is, in that case, entitled to half of the share which an adopted son exclusively related to the adopter would have been entitled to.—The fallacy of the dictum may also be evinced in another way, namely, if in the above case, the *Dwyámushyáyana* is entitled to half of his adopting father's property (as held by the learned gentleman,) then the remaining half necessarily becomes the portion of the legitimately begotten son, and thus the dictum in question proves to be contrary to the principle of the law and inconsistent with reason:—contrary to the principle of the law, because, the rule is (see *ante*, pp. 387, 388,) that, "where a legitimate son is born subsequent to the adoption, the adopted son takes one-third, and the legitimately begotten son is entitled to two-thirds:—inconsistent with reason, because, a legitimate son, subsequently born, having the right to perform all the religious rites beneficial to the late proprietor's soul, is justly and deservedly entitled to the double share (as ordained by the law) of the adopted son. (See his own work, Vol. I, p. 70.) Thus the dictum that a *Dwyámushyáyana* son is to have an equal share with a legitimately begotten son, is contrary not only to the law and reason, but also to the principle laid down by himself.

* See *ante*, pages 340, 341.

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have no right to the estate of their adoptive grandfather but to maintenance only.*

Authority. As sons, blind, lame, and so forth, do not inherit,—and since it is ordained, that their legitimate son, and son of the wife only, participate in the estate of the paternal grandfather; a son given or other description of son, adopted by such persons, has no right to the estate of the paternal grandfather, but to maintenance only. For, alimony being provided for the wives of persons blind and so forth, maintenance for their adopted sons is inferred *a fortiori*. So also, having previously declared sons blind, lame, and so forth, not to be heirs (an author) adds,—"Of these, the sons legitimate, and sons of the wife, who are free from defect, participate in a share: the childless wives of those (who are blind and so forth) are to be supported, if virtuous. Their daughters are to be maintained as long as unmarried."—*Dat. Ch.*, Sect. VI, § 1, 2.

Vyavasthá. **443.** From the expression that they have no right to the estate of their adoptive grandfather, it is inferred that *a fortiori* they have no right to the estate of the relations inferior to the grandfather, namely, those other than the parents, because their fathers (through whom they claim) had no right to the property of such relations.

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* A doubt might be entertained, as to the validity of an adoption, by one not being in the order of the '*Grihi*' (the house-holder or married man,) or by a blind, impotent, or other person, disqualified from inheriting. The more correct opinion, however, appears to be, that an adoption, by any of the persons described, would be valid; though it seems reasonable, that the affiliation of one excluded from inheritance, should confer no right of succession on the adopted, of which the adopter is debarred by law.—Sutherland's Synopsis, Head First, page 148.

The individuals excluded from inheritance are, "the impotent person, the outcast and his issue, one lame, a mad man, an idiot, a blind man, a person afflicted with an incurable disease, and others similarly disqualified," (See Chapter VIII.)—The possibility of a doubt, as to the legality of an adoption, by such persons, is suggested with reference to a passage in the *Mitákshará*, which declares, that the specific mention of 'the legitimate son and son of the wife, in a text of YÁJNAVALKYA, providing for the inheritance of such sons of disqualified persons,' is intended to forbid the adoption, by them, of other sons. The author of the *Dattaka-chandriká* likewise, arguing from the same or a parallel text, that an adopted son, is not ordained for disqualified persons, excludes such son of those persons from succeeding to the estate of the paternal grandfather. In the absence, however, of other authorities, those alluded to can hardly be admitted as sufficient to establish a general rule, vitiating *in toto* the adoption by one excluded from inheritance.—In fact the author of the *Dattaka-chandriká* without advancing such position, merely denies the right of one so adopted to inherit of his adoptive father; and perhaps no more was intended by the author of the *Mitákshará*.—Sutherland's Synopsis, Note iv, page 156.

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444. It follows, however, that the exclusively adopted sons, as well as *Dwyámushyáyana* sons, of such persons are entitled to their adoptive father's property, if any. *Vyavasthá.*

For they are nowhere prohibited to inherit their adoptive fathers' own property. Reason.

445. A son adopted, notwithstanding the existence of a legitimately begotten son, has no right to the property of the adopter. *Vyavasthá.*

Since it is shown, that a son given participates with a real legitimate son, born *subsequently* to his adoption, a son, adopted where a legitimate son exists, does not take a share. —*Dat. Ch.*, Sect. VI, § 3. Authority.

SECTION V.

Effect of the Non-performance of the Prescribed Forms and Rites.

446. A son adopted without the performance of the religious rites and ceremonies ordained for the purpose, is not entitled to inherit from his adopter, but to receive food and raiment, and assets sufficient for his marriage. *Vyavasthá.*

Vide Precedents, pages 565—570.

It is, therefore, established that the filial relation of adopted sons, is occasioned only by the (proper) ceremonies. Of gift, acceptance, a burnt sacrament *(homa)*, and so forth, should either be wanting, filial relation even fails.—*Dat. Mím.*, Sect. V, § 56. Authority.

The same author (Manu) propounds a special rule, should the due form for adoption not be observed:—"He who adopts a son without observing the rules ordained, should make him a participator of the rites of marriage *(a)*, not a sharer of the wealth."—*Ibid.*, § 45. Authority.

The meaning is; the marriage only of one adopted, without the form of adoption, is to be performed; no wealth is to be bestowed on him: on the contrary, in such case, the wife and the rest even succeed to the estate; for, without observance of form, his filial relation is not produced.—*Ibid.*, para 46. Explanation.

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Authority. In case, no form as propounded, should be observed, it will be declared, that the adopted son is entitled to assets, sufficient for his marriage.—*Dat. Ch.*, Sect. II, § 17.

Authority. Accordingly, an author declares the non-succession to a share of one adopted without observance of rule :—"Him existing, a son being created, and a son given existing, one being adopted informally, that estate is his only, who is justly master of the father's wealth." MANU :—"He who adopted a son without observing the rules ordained, should make him the participator of the rites of marriage *(a)*, not sharer of the wealth.—*Dat. Ch.*, Sect. VI, § 3.

Interpretation. *(a)* Marriage is merely illustrative,—food and raiment also should be given to him, in conformity with the text—"But it is just that the heir who knows his duty should give to all of them food and raiment for life without stint, according to the best of his power."*—Commentary on the *Dattaka-mímánsá*, Sanskrit, page 75.

SECTION VI.

ADOPTION INDEFEASIBLE.

Vyavasthá. **447.** A son completely and validly adopted cannot be discarded and disinherited, unless he become (by sin or disease†) disqualified from per-

Annotations.

447. The adoption cannot be affected by the residence of the adopted, which can but raise presumption as to the fact ; being once completely and validly made, it cannot be re-called.—Colebrooke's opinion.—See Stra. H. L., Vol. II, p. 111.

The adoption being complete, it cannot be annulled. An adopted son may be disinherited for like reasons as the legitimate son.—(*Mitáksh.* on In. Ch. II, Sect. X.) But he cannot forfeit the relation of son.—Colebrooke's opinion.—See Stra. H. L., Vol. III, p. 126.

By the laws of Solon, which introduced adoption into Greece, the adopted by begetting a son, and leaving him in his place, might relinquish the adoptive, and resume his station in his own family. But a Hindú adoption is permanent, unless in the instance, that has been alluded to, of an *Anitya-dwyámushyáyana ;* nor can the adopted

* MANU, See the Chapter on Exclusion from Inheritance.

† See *ante*, pages 8, 9, and the Chapter on Exclusion from Inheritance.

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forming the exequial and other religious rites, and so disentitled to inherit, in which case another son may be adopted in his stead.*

Vide Precedents, pages 648—650.

Because, a son is adopted for the sake of providing for the performance of the exequial and other religious rites;* so if the existing son become *civiliter mortuus* or disqualified from performing the rites for the performance whereof a son is adopted, then on account of the obligatory necessity of having a son for the above purpose, the affiliation of another son can legally take place, in the same manner as a son is adopted upon the natural or civil death of the begotten son † Consequently, he could not be repudiated or disinherited for any fault less than his disqualification from the performance of the duties in question. Reason.

448. Like a legitimately begotten son, an adopted son also may resign his right to the property of his adoptive father, but nevertheless he cannot free himself from his connection and duties as an adopted son. *Vyavasthá.*

Vide Precedents, pages 649, 650.

Annotations.

be deprived of his advantages for any cause, or upon any pretence that would not forfeit to a son begotten his natural right to inherit. —Stra. H. L., Vol. I, p. 101.

The right of inheriting, and that of performing for the ancestor his funeral obsequies being correlative, if by any of the legal disabilities, as by degradation from caste, by insanity, incurable disease, or otherwise, the living issue have become disqualified in law for the former, the effect for the purpose in question being the same as if none existed, it is inferred that the right to adopt attaches.—Stra. H. L., Vol. I, p. 77.

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* See *ante*, p. 268, *et seq.*, also pp. 289—291.

† See *ante*, pages 289—291.

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BOOK IV.

ON PARTITION.

CHAPTER I.

WHAT IS PARTITION—BY WHOM AND WHEN IT CAN BE MADE OR ENFORCED.

SECTION 1.

DEFINITION OF PARTITION.

Partition defined.

449. Partition consists in manifesting (or in particularizing*) by the casting of lots or otherwise, a property which had arisen in lands or chattels, but which extended only to a portion of them, and which was previously unascertained, being unfit for exclusive appropriation, because no evidence of any ground of discrimination existed.—*Dá. Bhá.*, Chap. I, § 8.

Partition further defined.

450. Or partition is a special ascertainment of property, or making of it known [by reference of a particular share to a particular person.]†—*Ibid.*, § 9.

451. Even in the case where a single article as a female slave, or a cow, or the like, is common to many, the property is severed by a separate use, in carrying burdens, or in milking, during specific periods, in turn.—*Ibid.*, para. 10.

As directed by VRIHASPATI:—A single female slave should be employed on labor in the houses (of the several co-heirs) successively, according to the number of shares:....and water of wells and ponds is drawn for use according to need (without stint)....such property (as is properly not divisible) should be distributed by equitable adjustment, else it would be useless (to the owner)."—*Ibid.*

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* ACHYUTA and SRÍKRISHNA.

† *By reference of a particular share to a particular person.*] So SRÍKRISHNA completes the sentence. He adds, "the making of property known here, signifies the casting of lots or other operation tending to the ascertainment of the right."—*Dá. Bhá.*, Chap. I, Annotation 9.

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SECTION II.

By whom and when partition can be made or enforced.

452. A father's own acquired property may be divided by him, or by his choice, at any time whatever; or it may be divided by his sons or heirs, when his right of property ceases by death, natural or civil, by disregard of temporal matters, or voluntary abandonment.* *Vyavasthá.*

There are two periods of partition, one when the father's property ceases; the other by his choice while his right of property endures.—*Dá. Bhá.*, Chap. I, § 38. Authority.

If it be said, the extinction of passions, without any condition annexed to it, marks the period for a division of the father's estate, that is denied, for it might be thence inferred, that partition would not take place, although the father were a degraded person, if he were not at the same time devoid of temporal regard.—*Ibid.*, § 40.

But if this be pronounced to be another period, then four distinct periods would arise: 1, the demise of the father; 2, his degradation; 3, his disregard of secular objects; 4, his own choice.—*Ibid.*, § 41. Authority.

Therefore two periods only are rightly affirmed. One when (right of) property ceases by the owner's degradation from his tribe, disregard of temporal matters, or actual demise; the other by the choice of the father while his (right of) property still subsists.—*Ibid.*, § 44. Authority.

It is because, there are two periods of partition in the case of the father's wealth that Manu† and Goutama‡ and others avoid the word "dead," and use the term "after." Since the father's right then ceases, the term "after" is employed to express that sense. Hence this is one period of partition. Another, regulated by his choice, while he does retain worldly affections, is indicated by the text—"A son born after division, &c."—*Ibid.*, § 46. Authority.

It is thus established by reasoning (as well as by positive law,§) that two periods exist for the partition of wealth appertaining to a father.—*Ibid.*, § 50. Conclusion.

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* See *ante*, pages 8 and 9.

† Manu, 9, 104.

‡ Goutama, 28, 1.

§ Sri'krishna.

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It is thus established, &c.] When partition is made by the father, his choice only is requisite, if the estate were acquired by himself; but if it be an estate inherited from ancestors, his will, joined with the circumstance of the mother's being past child-bearing, is required.—SRÍKRISHNA'S *Dáya-krama.*—*Colebrooke's* Annotation to the above passage.

Vyavasthá. **453. As regards the ancestral property, that is property descended from or through the paternal grandfather, the same can be divided by the father, or at his desire (and not otherwise) after cessation of his wife's catamenia, or after his becoming incapable of connubial intercourse.**

Vide Precedents, page 659.

Authority. SRÍKRISHNA :—A partition made by a father of his own acquired wealth is regulated by his will alone; but in regard to a division of the ancestral property, the circumstance of the cessation of the mother's courses must be associated with the father's will. This is the difference.—*Dá. Kra. Sang.*, Chap. VI, § 1.

NÁRADA says:—"When the mother (*a*) is past child-bearing, and when the sisters are married (*b*), or if the father be lost, or no longer a householder, or if his temporal affections be extinct.*—13. 3.

Exposition. The condition "when the mother (*a*) is past child-bearing," regards wealth inherited from the paternal grandfather. Since other children cannot be borne by her, when her courses have ceased, partition among sons may then take place, still, however, by the choice of the father. But if the hereditary estate were divided, while she continued to be capable of bearing children, those, born subsequently, would be deprived of subsistence. Neither would that be right: for a text expresses, "They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support: and the dissipation of their hereditary maintenance is censured."†—*Dá. Bhá.*, Ch. I., § 45.

(*a*) When the mother is past child-bearing.] Mother here denotes any wife of the father. SRÍKRISHNA.—See *Dá. Bhá.*, Ch. I, § 45, Annotation.

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* *Dá. Bhá*, Chap. I, para. 22.

† VYASA. The close of this passage is read otherwise in the *Mitákshará*, *Smriti-sára*, *Prakásha*, *Chintámani*, *&c.*, *viz.*, "No gift or sale should be made." RAGHUNANDANA in the *Dáya-tattwa*, SRÍKRISHNA, and VIDYÁ VÁCHASPATI in the *Dáya-rahasya* copy JÍMÚTA-VÁHANA'S reading of the passage.

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Since the condition is stated by way of illustration, it intends generally the impossibility of further male issue; if therefore it be possible, that the father should have issue by another wife, partition should not be made.—ACHYUTA.—*Ibid.*

Even then when the father's wife is incapable of bearing issue, partition is by the father's choice.—SRÍKRISHNA.—*Ibid.*

(a) The term "mother" comprehends also the step-mother; for she also can bring forth a son (to the father.)—*Dá. Ta. Sans.* 12.

So the father's choice must be preceded either by the circumstance of the mother and step-mother being past child-bearing, or by that of the father being incapable of connubial intercourse.

If the cessation of the mother's courses be joined, as a condition, with the extinction of the father's worldly inclinations, it might be concluded, that partition could not take place among sons, however desirous of it, when the father becomes a hermit (his temporal propensities being extinguished); since the cessation of the mother's courses cannot yet have happened [while she is still between thirty and forty years of age.]—*Dá. Bhá.*, Chap. I, § 39. Remark.

(*b*) The condition "and when the sisters are married," does not intend a distinct period, but inculcates the necessity of disposing of them in marriage.—*Ibid.*, § 47. Exposition.

The phrase "When the sisters are given away (in marriage)" is added to show the necessity of bestowing them in marriage after the death of the father: it does not denote, says JÍMÚTAVÁHANA, that partition cannot take place unless the sisters have been given away (in marriage.)—*Coleb.* Dig., Vol. III, p. 52. Exposition.

454. But if the father be unable to make a partition or unwilling to take the trouble, his sons or heirs, may, at his desire or under his direction, divide the ancestral estate at or after the above-mentioned time, and his self-acquired estate, at any time whatever; but they are not competent to divide any of those properties without his permission or authority, unless he forfeit his right by any disqualifying defect, mental or corporeal, even though he be very old or otherwise incapable of business. *Vyavasthá.*

Vide Precedents, page 659.

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Authority. GOUTAMA :—After the father's death (natural or civil) let sons share his estate : or while he lives, if the mother be past child-bearing, and he desire partition.*

Authority. BOUDHÁYANA :—Partition of heritage is to take place with the permission of the father.—Cited in the *Viváda-chintámani*, page 37.

Authority. The alleged power of sons to make a partition, when the father is incapable of business [by reason of extreme age,†] has been asserted through ignorance of express passages of law [to the contrary.] Thus HÁRÍTA says:—"While the father lives, sons have no independent power in regard to the receipt, expenditure and bailment of wealth. But, if he be decayed, remotely absent, or afflicted with disease, let the eldest son manage the affairs as he pleases." So SANKHA and LIKHITA explicitly declare :—"If the father be incapable, let the eldest manage the affairs of the family, or, with his consent, a younger brother conversant with business. Partition of the wealth does not take place, if the father be not desirous of it, when he is old, or his mental faculties are impaired, or his body is afflicted with a lasting disease. Let the eldest, like a father, protect the goods of the rest; for [the support of] the family is founded on wealth. They are not independent, while they have their father living, nor while the mother survives."—*Dá. Bhá.*, Chap. I, § 42.

Authority. These two passages, forbidding partition when the father is incapable of business, or when he labours under a lasting disorder, direct, that the eldest son should superintend the household, or a younger son who is conversant with business. The text last cited, therefore, runs "not if the father desire it not;" and it was by mistake that it was written "if he be incapable of business, partition of the wealth takes place, &c."—*Dá. Bhá.*, Chap. I, § 43.

Authority. Thus (since sons have not power to require partition‡) a division even of wealth inherited from the grandfather must be made by the sole choice of the father. But, with this difference, that it is requisite the mother should have ceased to be capable of bearing issue: whereas, in the instance of his own acquired property, partition takes effect without that condition.—*Dá. Bhá.*, Chap. II, § 34.

Authority. A division of it does not take place without the father's choice: since MANU, NÁRADA, GOUTAMA, BOUDHÁ-

* *Dá. Kra. Sang.*, Chap. VI, § 3. *Coleb.* Dig., Vol. III, p. 51.
† SRÍKRISHNA. ‡ SRÍKRISHNA.

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YANA, SANKHA, LIKHITA, and others, (in the following passages, "they have not power over it,"* "they have not ownership while their father is alive and free from defect,"† "while he lives, if he desire partition,"‡ "partition of heritage by consent of the father,"§ "partition of the estate being authorised while the father is living," &c.)‖ declare, without restriction, that sons have not a right to any part of the estate while the father is living, and that partition awaits his choice: for these texts, declaratory of a want of power, and requiring the father's consent, must relate also to property ancestral; since the same authors have not separately propounded a distinct period for the division of an estate inherited from an ancestor.—See *Dá. bhá.*, Chap. II, § 8.

455. If the hereditary estate is nevertheless divided by, or at the desire of, the father, while his wife continued to be capable of bearing children, the son subsequently born must have his share out of the said estate. *Vyavasthá.*

See the Section treating of the son born after partition.

If shares have been distributed, although the mother were not too aged to bear more sons, what should follow?—has a son been born after partition, or not? In the first case, the remaining wealth, omitting what has been consumed, must be brought together, and a second distribution must be made: for sons, though born after partition, claim shares of the patrimony which had descended from the grandfather. But in the second case, that very partition is valid. Let it not be objected, that, since the mother's arrival at a certain period of life can alone entitle the parceners to divide (the estate,) that partition, being made by persons not authorised (to do so) is void, like one which is made by a stranger. Since the phrase 'when the mother is too aged to bear sons,' may be explained as providing for the participation of a future son, there is no proof by which it can be established to propound a distinct authority for partition. However, property ill-distributed must be again divided. 'If the mother is too aged to bear more sons', relates to the patrimony which had descended from the grandfather; for, unless the mother be too aged to bear more sons, partition could not be made among existing sons, since it is reasonable to reserve for those who may be hereafter born, their right to the patrimony inherited from the grandfather: and this is a mere instance of comprehending the case of a father capable of connubial intercourse, but refraining from it: else the son of another wife could Authority.

* MANU, 9, 104.
† Cited from NÁRADA, but is part of a text of DEVALA.
‡ GOUTAMA, 28, 2. § BOUDHÁYANA.
‖ SANKHA and LIKHITA.

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have no share. This is evident from the text of NÁRADA:—'When the mother is too aged to bear more sons, and sisters have been given away (in marriage,) and the father refrain from the connubial intercourse,' (then shall the partition be made.)—*Coleb.* Dig., Vol. III, pp. 48, 49.

Remark. The author of *Vivâda-bhangârnava*, after declaring, "While the father's right subsists, his choice alone determines the time for (making partition of) his own acquired wealth: but, in the case of property inherited from ancestors, it is also requisite that the mother be past child-bearing," says: "and (with this reserve,) the father, or, according to another opinion, he or his son, may choose (the time.") Such opinion is not, however, respected in Bengal:—1. Because it is repugnant to the dictum of BOUDHÁYANA,—"Partition of heritage (is to take effect) by consent of the father;" 2. Because the son's choice is of no avail at all, the inchoate right arising from birth not being admitted in the Bengal School; 3. Because the division of the estate can never take place if the father, being desirous to marry another wife, does not make the partition notwithstanding the son, after cessation of his mother's catamenia, desired to have the partition made; and 4. Because it is opposed to the opinion respected and quoted by the said author himself, *viz.*,—"In the partition of property inherited from the grandfather, whose will is consulted? The answer is, partition is granted by the sole will of the father: for he is owner of that wealth."*—See *Coleb.* Dig., Vol. III, p. 42; and *ante*, pp. 418, 419.

Vyavasthâ. **456. After the father's death, natural or civil,† partition of his estate, inherited as well as acquired, may be made by his sons or heirs, or enforced by any of the heirs.**

Vide Precedents, pages 656, 661.

Annotations.

456. POITHÍNASI, too, "When the paternal inheritance is to be divided, the shares shall be equal among the brothers."—'Paternal inheritance' means *wealth forming the subject of inheritance.* By the plural of the word "brothers" being used in the above text, it cannot be objected to, that where the brothers are of the dual number, there could be no partition, the term "brothers" being used in the text simply to denote the heirs to a common property.—*Smri. Chan.*, Chap. II, Sect. ii, Cl. 3 and 4.

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* The same author has likewise expressed an opinion, that sons, oppressed by a step-mother, or the like, may apply to the king, and obtain a partition from their father of the patrimony inherited from the grandfather, though not a partition of the wealth acquired by the father himself. This also, for reasons above shown, is not the law as current in Bengal.

† See *ante*, pages 8 and 9.

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But after the demise of the father, it (*i. e.*, partition) takes place equally in this case of both sorts of property, (the father's estate or the grandfather's)* without distinction.—*Dá. Bhá.*, Chap. II, § 33. Authority.

RAGHUNANDANA:—If the right of property be annulled by death or degradation, or by quitting the order of a householder, sons are entitled to partition; and so they are even though the right of property remain, if the father be devoid of wish for wealth which appertains to him.—*Dáya-tattwa*, Sans., p. 3.—See Coleb. *Dá. Bhá.*, Chap. I, Annotation 33. Authority.

YÁJNAVALKYA:—Let sons (*c*) divide equally both the effects and the debts after (the demise of) their two parents.† Authority.

(c) The sons.] The persons, who make the distribution, are thus shown.—*Mit.* In. Ch. I, Sect. iii § 2.

The term "brothers" indicates heirs in general; consequently the meaning is that, after the death of the proprietor, his heirs can divide his property ancestral, as well as acquired.

MANU:—After the death of the father and mother (*d*), the brothers being assembled (*e*), will equally divide the paternal estate; for they have no power over it while they live.—Chap. ix, *v.* 104. Authority.

(d) By the phrase "After the death of the father," the time when the father's estate is to be divided is indicated, and, by the words, "and the mother," following the above phrase in the text, the time when the mother's estate is to be divided is shewn. Hence, a father's estate may be divided although the mother be living: likewise, a mother's estate may be divided although the father be alive. It is unnecessary that both the parents should have died before a partition of the property of either of them could take place. Accordingly, SANGRAHA-KÁRA: "A partition of the father's wealth may take place even whilst the mother lives, for this reason, that, without her husband, the mother does not, from her independence, derive ownership. A partition of the mother's wealth also may take place in like manner while the father is alive; for, if there be issue, the lord (of the wife) is not the lord of the wife's wealth." Because, the father's widow, without her husband, that is, even after Exposition.

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* SRÍKRISHNA.

† Vide *Dhá. Bhá.*, Chap. III, Sect. i, § 4.

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the demise of her husband, possesses no independent power over his property, and because likewise a husband, while sons are living, possesses no ownership over the property of his wife; therefore, the partition of the property of one of them, while the other is living, is proper. Such is the meaning of the above passage.—Vide *Smriti-chandriká*, Chap. I, § 12, 15, 16 and 17.

JÍMÚTA-VÁHANA, the highest authority with the Bengal School, has, however, given a different exposition, which is as follows:—

Exposition. "Partition is pronounced to be not lawful, among brothers of the whole blood, while the mother lives, although the ownership of wealth be vested in them by the death of their father. For the text ("after the father and the mother," &c.*) propounds a division of the paternal estate among brothers of the whole blood subsequent to the demise of both parents."—It does not intend a distribution of the mother's goods, after her demise. For partition of the patrimony only is suggested by the term paternal; and there is no authority for interpreting it parental.—Besides, it would be a repetition: for the division of the maternal estate, on the death of the mother, is subsequently noticed by MANU in a separate text.†—The author, declaring that brothers may divide after the death of the father and mother, propounds a time subsequent to the demise of both as a fit period of partition; and the association [of their deaths] appears therefore to be designedly expressed.—Therefore, as in the case of other wealth of the mother's, so in this instance [of the father's wealth, which has become their property,‡] sons have not independent power to make a partition among themselves, while the mother lives; but with her consent, the partition is lawful.—*Dá. Bhá.*, Chap. III, § 1, 2, 3, 6 and 13.

Authority. (*e*) Since any one parcener is proprietor of his own wealth, partition at the choice of a single person is thence deducible; and concurrence of heirs, suggested as one case of partition, is cited explanatorily in the text: "the brethren being assembled, &c." Else, since assemblage implies many, there could be no distribution between two; for no passage of law expressly propounds a division between two co-heirs.—*Dá. Bhá.*, Chap. I, § 35. Hence,—

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* MANU, 9, 104.

† MANU, 9, 192. ‡ ACHYUTA and SRÍKRISHNA.

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457. Partition of common or joint property can be made or enforced at the instance even of a single co-heir or the heir of a deceased co-heir. *Vyavasthá.*

Vide Precedents, pages 656, 659, 661.

458. Any co-heir, or the heir or representative of a co-heir having a right to exact partition, the guardian, next friend or well-wisher of a minor possesses also the same right; with this difference, *Vyavasthá.*

Annotations.

457. The right of a nephew to receive his father's share from his uncle is explicitly declared in a passage of KÁTYÁYANA (cited in 3 Dig., p. 7, text lxxix). And the power of *any one* of the co-heirs to exact partition of the joint property may be gathered from the *Mitákshará*, and is distinctly affirmed by JÍMÚTA-VÁHANA (in the *Dáya-bhága.** Chap. III, Sect. i, § 16)

Any one of the parties possessing or inheriting a joint estate, may enforce a partition of it. One of five brothers, for instance, may compel the other four to give him a separate share, or the sons of a brother, may compel their uncles to give them a separate share, or the widow of a brother may compel the brothers of her husband to give her a separate share.—Cons. H. L., p. 45.

If out of ten brothers of an undivided family, one shall die leaving three or four childless widows, or any number of widows having daughters only, and shall not leave a son, the widows will of course succeed to their husband's estate; any one of these may then against the will of her co-widows separate herself from the nine surviving brothers of her deceased husband.—*Ibid.*, p. 46.

Partition may be enforced as well of the immoveable as of the moveable property, whether it be ancestral or jointly acquired.—*Ibid.*

458. It seems equally clear, that it may be enforced for the benefit of a *minor*, as where his co-parceners are committing waste. In such a case, his guardian, or, in default of one, any relation not interested, would be competent to institute a suit for the purpose; by which his share, being separated, must be secured for him till he come of age; otherwise, as against him, a partition would be void.—*Stra.* H. L., Vol. I, (F. E.) p. 182.

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* This passage runs thus—"But partition takes places by the will of any one (of the co-heirs) as before intimated."

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however, that he can exact it when there is danger or probability of his ward's share being wasted, unless separated by partition.

Vide Precedents, pages 656, 658, 661.

Vyavasthá. **459.** But if a co-heir has given up his share without any consideration, or in lieu of something had and received, or has received some property in the shape of his share,* then neither he nor his heir can again claim a share in the joint estate, and enforce a partition thereof.

Vide Precedents, pages 658, 660.

Inasmuch as such co-heir has lost his claim by abandonment, and his heir, who claims *through him,* is entitled only to what his predecessor was entitled.

Vyavasthá. **460.** The persons who, only upon partition, are entitled to shares, not as heirs but as having a claim to be maintained out of the estate, have no power to enforce partition.

Vide Precedents, pages 657, 658.

Annotations.

458. The Sovereign, or his representative, as guardian of the minor, is competent to authorize a partition ;—and an application to him, for his authority for the purpose, might constitute a suit. Nothing has been found in the law to prohibit the demand of a partition for the benefit of a minor (3 Dig., p. 544, text cccliii. 2.) Colebrooke's opinion.—See Stra. H. L., Vol. II, (F. E.) p. 294.

459. As on a partition by a father, so among co-heirs, any one not wanting his share, may waive it by acceptance of a trifle, such acceptance operating as an estoppel against his claim ever after.—*Stra.* H. L., Vol. I, (F. E.,) pp. 183 and 184.

460, 461.—This can be done by those alone, who are considered as *heirs,* in contra-distinction to those, who have a claim only to be *maintained,*—of which latter description are the widow or widows of the deceased, leaving at his death male issue ;—the

* See *ante,* page 21, also the Chapters treating of Partition by a father and brothers or co-heirs.

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These are a wife, mother, grandmother and the rest. Because although in the partition, made by a man, of his own estate, his sonless wife is entitled to a son's share (to be made up with her *stri-dhana*), and so is a mother or grandmother in the partition of her husband's estate made by her sons, or grandsons, yet those females have no right to enforce the partition, they not being, in this instance, heirs, but simply entitled to have maintenance in the shape of shares. Illustration.

461. But where such a female is entitled to a share as an *heiress*, *there* she has certainly a right to enforce partition and exact her own share of the estate.* *Vyavasthá.*

Vide Precedents, pages 656, 657, 668.

462. Where partition is effected by one or more of the co-heirs, or their representatives, there the rest also may have their respective shares, or they may keep them joint among themselves. See the Chapter on Re-union. *Vyavasthá.*

Annotations.

principle being, that the right is co-ordinate with the gift of funeral cakes. It may take place with reference to one only, leaving the rest as they were before (undivided), or, it may be general, all consenting.—Stra., H. L., Vol. I, (F. E.) p. 180.

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* See *ante*, pages 423, 424.

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CHAPTER II.

ON PROPERTIES ANCESTRAL, PATERNAL, JOINT OR COMMON, AND SELF-ACQUIRED—EFFECTS LIABLE, OR NOT LIABLE, TO PARTITION.

SECTION I.

ANCESTRAL, PATERNAL, JOINT OR COMMON, AND SELF-ACQUIRED PROPERTIES DEFINED.

Vyavasthá. **463.** Property descended from or through the paternal grandfather or any other ancestor in the direct male line is termed "ancestral or hereditary property *(poitámaha* or *kramágata dhana)*;"—that which is acquired by the father or inherited by him from any other relative (agnate or cognate) is called "paternal *(poitrika)*;"—and that which is inherited by any other person from a collateral or maternal relation or from any other person is denominated simply "inherited property *(sankránta dhana)*." Hence,—

Vyavasthá. **464.** The property devolved from the maternal grandfather and the rest can be used as self-acquired property.

YÁJNAVALKYA :—The ownership of father and son is the same in the property which was acquired by the paternal grandfather, or in corrody, or in chattels.—*Dá. Bhá.*, Chap. II, Para. 9.

That the property descended from the paternal great-grandfather is to be treated as that inherited from the paternal grandfather, appears to be indisputable. But the question is, whether property inherited from the maternal grandfather and the rest is or is not to be treated just as that devolved from the paternal grandfather? To this question some reply, that "his own acquired wealth," in the text of VISHNU, signifies that which was gained by his own act; but, what is received from the maternal grandfather, being gained without any exertion on the part of the father, is not acquired by his act; he shall therefore receive two shares or the like, as suggested by the general rule. It should not be objected, that the text only ascribing to the father and son equal dominion over property left by a paternal grandfather, they have not such claims in this case. Their equal dominion is a necessary consequence of considering the

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term, 'property left by the paternal grandfather,' as a mere instance of a general sense; else it would not be a rule, that the father, being the son of one born blind shall take two shares or other (greater) portion of property inherited from the paternal great-grandfather. The term 'property left by the paternal grandfather,' must be explained as 'property inherited in right of affinity:' whether it be received from the paternal great-grandfather, and so forth, the father and son have equal dominion over it. Nor should it be argued, that property regularly descending from ancestors, is alone intended by the term 'estate left by the paternal grandfather;' and that any other property, whether left by a maternal grandfather, or received in a present, or the like, is regulated by the law which allows the reserve of the greatest part and so forth. There is no argument to prove that an estate devolving from the maternal grandfather and the rest is not considered as regularly descending from ancestors: and legislators have not distinguished property devolving eventually on collaterals or on descendants in the female line." Against this JAGAN-NÁTHA affirms:—"That reply is not satisfactory; for, when the heritage of one who leaves no kinsman devolves on a fellow student, or on a learned priest, the father and son would have equal dominion. In the case where the son of a daughter's son does not succeed to property eventually devolving on a distant heir, by failure of the direct descent in the male line, surely that son has no dominion if his father be dead; but, if his father be living, he is not even noticed. The very same exposition is proper in respect of the heritage devolving from the father of the paternal great-grandfather, on the grandson of his grandson; for that has not regularly descended* from ancestors. But the heritage of the paternal great-grandfather, successively devolving on his son and the rest until it reach the great-grandson, has regularly descended, in that case the rule of equal dominion vested in father and son must be argued: however, when a great-grandson, whose father and grandfather are both dead, succeeds to the estate of his paternal great-grandfather, he and his son have equal dominion. There is no objection to explain 'property left by the paternal grandfather' an estate inherited in right of birth whereby the ancestor attains a region of bliss; for texts show, that a man reaches heaven by the birth of a son, of a son's son, and of the son of that grandson."†—*Coleb.* Dig., Vol. III, pp. 61—63. Authority.

"If a father make a partition between himself and his sons, he may give or reserve, at his pleasure, any part of his acquired wealth:"—after this text of VISHNU, the author of *Vivâda-bhangârnava,* having cited the following opinions of *Chandeshwara* (1) and *Misra* (2),—"this concerns wealth acquired by the father without using the patrimony which Remark.

* Regular descent extends only to the great-grandson; on failure of him the estate devolves on the wife, &c., but after some deviations the line of successions reverts to the lineal kindred. Note by Mr. Colebrooke.

† See *ante,* pages 16 and 17, both body and notes.

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had descended from his own father" (1), "what has been acquired without adventuring patrimony, a father has power to distribute in equal or unequal shares" (2),—says: "that is reasonable; for, what is gained on the adventure of property left by his father, being considered as an acquisition of his father, by means of that property adventured, is deemed a part of his patrimony." (Dig., 2, p. 539.) This, however, is not the doctrine of the Bengal School, according to which, the incohate right arising from birth not being admitted, the son has no right to his grandfather's property while the father lives; so any thing acquired by the use of the grandfather's property which devolved on the father, and which is then held to be the father's, is of course his own acquired property, and not a part of his patrimony. Hence,—

Vyavasthá. **465. Property acquired by a father with the ancestral money, or with the income of ancestral property, also the accretions or augmentation made by him to such property, and also what has been acquired by him through science or valour, or recovered by him from an usurper, are, according to the law of the Bengal school, "his self-acquired property."***

Authority. VRIHASPATI says:—"Over property descending from a grandfather but seized by strangers, which the father recovers by his own power, and over what the father has gained by science, valour, or the like, ownership [*Swámyam*] is declared to be in the father."—See *Smri. Chan.*, Chap. VIII, Cl. 24.

Explanation. The meaning is, that which belongs hereditarily to the family, but had been seized by strangers and recovered by the father through his self-exertion alone, and that which was acquired by the father himself through science, valour, or the like, these the father need not give to his sons in partition.—*Smri. Cha.*, Chap. VIII, § 28.

Authority. MANU:—If a father recover the property of his father (seized by strangers, and) which remained unrecovered, he shall not, against his will, share it with his sons, for in fact it was acquired by himself.*

Annotations.

463—466. The common stock (as has been already observed) may consist either of ancestral, or of acquired, property, or of both; having been augmented or improved, the benefit on partition, as well as during the period of joint occupancy, accrues to all alike, without regard to the degree in which each may have contributed to its enhancement.—Stra., H. L., Vol. I, p. 213.

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* See *Dá. bhá.*, Chap. VI, Sect. i, § 33, Sect. ii, § 32.

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YÁJNAVALKYA.—Over the grandfather's property which was seized (by strangers) and is recovered by the father through his own ability, and over (any thing) gained by him through science, valour or the like, the father's full dominion is ordained. He may give it away at his pleasure, or he may defray his consumption with such wealth; but, on failure of him, the sons are pronounced entitled to equal shares.* Authority.

466. Property jointly inherited, or acquired in concert, by co-heirs or co-parceners, as well as what is acquired or received by any of them with the aid of joint funds or labour, or of both, or what is augmented by him, is common among them all, while *that* which is acquired by a co-parcener with the aid of another is common between them alone.† *Vyavasthá.*

Vide Precedents, pages 673—676, 684, 695, 696, 697, 698, 702, 709—712.

VRIHASPATI:—All the brethren shall be equal sharers of that which has been acquired by them in concert.—See *Mit. Inh.*, Chap. I, Sect. iv, § 15. Authority.

467. Ancestral property (excepting land,)‡ usurped by a stranger, if recovered by a co-parcener without the aid of the joint funds or *Vyavasthá.*

Annotations.

According to the law of the other Schools:—

463—465. Ancestral property, as amongst descendants, comprises property transmitted in the direct male line from a common ancestor, or accretions to such property made with the aid of the inherited ancestral estate.—West and Bühler, BK. 2, Intro. p. 19.

466—467. And here it may be remembered, that whatever may have been acquired by him, using the patrimony for the purpose, is construed as forming a part of what has descended; while, of that which is properly ancestral, any portions that, having been lost during the time of the ancestor, have been since recovered by his successor, without the use of the patrimony, are looked upon as

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* See *Dá. Bhá.*, Chap. VI, Sect. i, § 33, and Sect. ii, § 32.

† See *Dá. Kra. Sang.*, Chap. IV, Sect. i, § 1—6; and *Dá. Bhá.*, Chap. VI, Sect. i, § 1, 14; also *Vyavasthá* No. 495 and the authorities relative thereto.

‡ See *Vyavasthá* 495 and the authorities, &c., relative thereto.

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labour, or of both, but with the consent or privity of the co-heirs, is treated as his (the acquirer's) own acquired property;—but if acquired *without* the consent or privity of the co-heirs, or *with* the aid of the joint funds or labour, or of both, it is held to be common to all, the acquirer being entitled only to a larger share.

Vide Precedents, pages 668—672, 703, 715.

Vyavasthá. **468.** Property purchased or acquired by, or in the name of, the manager of an ancestral or common estate, or any member of a joint family, and pleaded to have been acquired with *his* separate funds or sole exertions, must be presumed to be a common property divisible among the co-sharers of the joint estate, so long as it is not proved to be otherwise.

Vide Precedents, pages 662—668, 683.

Vyavasthá. **469.** Property acquired by science, art or valour, with the aid of joint funds or labour, or of both, also that acquired without such aid but by means of such science or art as was learnt at the expense of the joint funds of the family or from a member thereof, is common to all the parceners. But if the science or art in question was learnt (not from a member of the joint family, but) from a stranger, then the property acquired thereby, as also that acquired through valour, without the aid of the joint funds or labour, or of both, classes as the self-acquired property of the acquirer.

Vide Precedents, pages 677, 697, 698.

Annotations.

acquired; and such augmentations are liable to be classed and treated accordingly on a partition.—Stra., H. L, Vol. I, pp. 194 and 195.

467. To recur to the distinctions between the different kinds of property:—if any, lost in the time of the ancestor, be recovered by his successor, it is no longer regarded as ancestral, but classes as acquired; while what has been acquired, through the use of the patrimony, is considered as ancestral.—Stra., H. L., Vol. I, p. 16.

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470. Whatever is earned by a co-parcener without the aid of joint funds or labour or of both, is exclusively his own acquired property, even though at the time of the acquisition he was a member of the joint family. *Vyavasthá.*

Vide Precedents, pages 677—684, 699—702.

471. Property inherited by any member of the family from his own relatives, or what is received in gift irrespective of any connection with, or without detriment to, the joint estate constitutes his self-acquired wealth. *Vyavasthá.*

Vide Precedents, pages 677—689, 697—702.

Authorities for the *Vyavasthás* 468, 469, 470, 471 are to be seen in the two following sections.

472. Where there is ancestral real property, the father has full dominion over the personal property though inherited from the grandfather, as if it were his own acquired property. *Vyavasthá.*

YÁJNAVALKYA.—The father is master of gems, pearls and corals, and of all (other movable property); but neither the father nor the grandfather is so of the whole real estate.—See *Dá. bhá.*, Chap. II, § 22. Authority.

But where the (grandfather's) estate consists not of land, corrody, and slaves, but only of gems and other movable property, there the father has not power to consume or dispose of all; since the reason is the same, and the text which declares the father to be *master* applies where the estate consists of both movable and immovable property.—SRÍ-KRISHNA'S Commentary on the *Dáya-bhága, Sans.*, p. 42. Authority

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SECTION II.

Effects not liable to Partition.

Vyavasthá. **473.** Whatever property is acquired without detriment to, or aid from, the joint estate, or without the aid of a co-parcener or co-parceners,—whatever ancestral property (excepting land,)* which was usurped by a stranger is recovered with the consent or privity of one's co-heir, but without his aid,—whatever is received from a friend, or as a mark of respect, or at nuptials, or on account of marriage, and—whatever is gained without aid from the joint estate, by valour, or through science which was not learned at the expense of the joint family or from a member thereof,* are impartible, the same belonging solely and exclusively to the acquirer

Vide Precedents, pages 668—672, 676—689, 697—702.

Annotations.

470—473. A member of an undivided family, continuing such, and enjoying, in common with his co-heirs, every advantage incident to their unseparated state, may, in the mean time, acquire separate property to his own particular use; in which, upon a division, they will have no right to share. But the acquisition, in order to be so, must have been an original and independent one; the essence of the exclusive title consisting in its having been made by the sole agency of the individual without employing for the purpose what belongs in common to the family. If the family property have been instrumental to it, it vests in the family.—Stra., H. L., Vol. I, p. 213.

473. The most common ground of impartibility is *separate acquisition.*—*Ibid.*, p. 189.

473. If patrimonial stock was used, all the brethren share alike. If the joint stock has not been used, he by whose sole labour the acquisition has been made is alone entitled to the benefit of it. And where property has been acquired without aid from joint funds, by the exclusive industry of one member of an undivided family, others of the same family, although they were at the time living in co-parcenary with him, have no right to

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* See *Vyavasthás*, 489, 495, and the authorities, &c., relative thereto.

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MANU :—Wealth however acquired by learning belongs exclusively to him who acquired it, so does any thing given by a friend, received on account of marriage, or presented as a mark of respect to a guest.—See *Vi. Chi.*, p. 949. Authority.

MANU AND VISHNU :—What a brother has acquired by his labour, without using the patrimony, he need not give up without his assent; for it was gained by his own exertion.* Authority.

An expenditure of wealth for nourishment or other use, must, however, necessarily be made even by a person remaining at home; and such expenditure is not designed for the acquisition of wealth; but *its having been actually intended for that purpose* is a requisite (to its being the cause of gain :) consequently the supposition does not go too far. Accordingly, VISHWA-RÚPA has said :—" When wealth is not acquired by giving (or using) paternal property, it is declared not to be common, merely because property may have been used for food or other necessaries; since that is similar to the sucking of the (mother's) breast." Hence though Authority.

Annotations.

participate in his acquisition. The rule is the same with respect to property recovered, excepting land, of which the party recovering it is entitled to a fourth more than the rest of his brethren.—Macn., H. L, Vol. I, p. 53.

Presents received at nuptials, as well as the acquisitions of learning and valour, are, generally speaking, not claimable by the brethren on partition.—Macn., H. L., Vol. II, p. 53.

Nuptial gifts, which a man receives with his wife, are particularly noticed as exclusively his ;—which is the more remarkable, as the funds of the family must bear the expenses of the marriage ; but, as already intimated, this does not render them partible, the expenditure being incidental only. So, as to what is received at a marriage, in the form termed *ásura*, at which presents are made by the bridegroom to the father, or kinsmen of the bride. It must be exclusive also to the donee ; for, if it be made on the ground of his being the son of a particular person named, all the other sons (if any) participating in the consideration, the effect of common relationship prevails ; and it is the same as though it had been expressed as for all, in which case there could arise no question as to the effect.—Stra., H. L., Vol. I, pp. 215, 216.

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* See *Dá. bhá.*, Chap. VI, Sect. i, § 31 ;—*Dá. Kra. Sang.*, Chap. IV, Sect. ii, 5 ; and *Coleb.* Dig., Vol. III, pp. 332—385.

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much wealth belonging to the father have been expended in festivity at the son's initiation, or at his wedding, what is obtained by him in alms during austerities as a student, or received on account of his marriage, is not common; for that expenditure of wealth was not made with a view to gain.—*Dá. Bhá.*, Chap. I, Sect. i, § 47—49.

Authority. The rest of the brethren can only claim shares of that wealth, for the acquisition of which money was expended (out of the family estate,) or which was acquired by learning attained through the instructions of the father with a maintenance provided out of the patrimony. Accordingly it is remarked by JÍMÚTA-VÁHANA, that wealth acquired by the use of the common stock employed for that very purpose, is justly considered as joint property.—*Coleb.* Dig., Vol. III, p. 311.

Authority. YÁJNAVALKYA :—Whatever else is acquired by the co-parcener himself, without detriment to the father's estate, as a present from a friend (*a*), or a gift at nuptials (*b*), does not appertain to the co-heirs.—*Dá. Bhá.*, Ch. I, Sect. i, § 33.

Exposition. (*a*) Here the mention 'a present from a friend' and so forth is intended for illustration only; since it is in such modes that, acquisitions are usually made without expenditure.

Explanation. (*b*) '*Gift at nuptials*'—that is, received from the parents-in-law by reason of having become their son-in-law.—*Dá. Kra. Sang.*, Chap. IV, Sect. ii, § 4.

Authority. VYÁSA :—Wealth gained by science, or earned by valour, or what is received from affectionate kindred (*soudáyika*), belongs, at the time of partition, to him (who acquired it); and shall not be claimed by the co-heirs.*

Authority. VYÁSA :—What a man gains by his own ability, without relying on the patrimony, he shall not give up to the co-heirs; nor that which is acquired by learning.*

Conclusion. Since it is expressed in general terms, "what he gains solely by his own ability," all property, so acquired, being his own, is not common. But as the gains of science, though obtained by the man's own ability, are shared by parceners equally or more proficient in knowledge, the phrase 'nor that which was acquired by learning,' is subjoined for the sake of excluding illiterate or less learned parceners.—*Dá. Bhá.*, Chap. I, Sect. i, § 6.

Authority. YÁJNAVALKYA :—He who recovers (*c*) hereditary property, which had been usurped, shall not give it up to the co-parceners: nor what has been gained by science.*

* *Dá. Bhá.*, Chap. VI, Sect. i, § 5, 33. See *Dá. Kra. Sang.*, Chap. IV, Sect. ii, § 2—6.

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(c) The word "recovers" being used in the singular number, it is meant that the recovery must be even without the corporal aid of another.—SHRÍ-KRISHNA's Commentary on the *Dáya-bhága, Sans.*, p. 120. Interpretation.

Thus the author, denying the right of unseparated coheirs, in the property, because it has been recovered, although a trace of the former right exist, denies the remoter title of the rest to wealth originally gained by the man himself. Exposition.

VRIHASPATI:—Over the grandfather's property which has been seized (by strangers,) and is recovered by a father through his own ability (*d*), and over any thing gained by him through science, valor or the like, the father's full dominion is ordained. He may give it away at his pleasure, or he may defray his consumption with such wealth; but on failure of him, the sons are pronounced to be equal sharers.—*Dá. Bhá.*, Chap. VI, Sect. ii, § 34. Authority.

(d) Through his own ability.] The author thus indicates a separate personal exertion. In both texts* the term "father" is indefinite: for a reason (of the precept) is stated; "Since in fact it was acquired by himself."—*Ibid.*, § 35, 36. Interpretation.

The rule must be understood in the instance of any such hereditary property, other than land, exactly as in the case of property not hereditary, but acquired by the man himself. (*Dá. bhá.*, Chap. VI, Sect. ii, § 37.) Regarding land there is a special rule. (See *Vyavastha* 495 and the authorities, &c., relative thereto.) Remark.

This, therefore, is ascertained from the above and other texts:—'What has been acquired by a separated or an unseparated parcener without adventure of the joint stock, and without the corporal aid of another, belongs exclusively to the acquirer, and is indivisible with the rest.'† Conclusion.

MANU:—The gains of science do, however, belong exclusively to him who acquired the same, and so does any thing given by a friend, received on account of marriage, and what is obtained as *Mádhu-parkika* (*e*). Authority.

(*e*) '*Mádhu-parkika*'] Obtained by officiating as a priest.—*Shri-krishna's* Commentary on the *Dáya-bhága*. Sans., p. 123.

(*e*) As a mark of respect at the time of giving a *Madhu-parka*.—KULLÚKA BHATTA's Commentary on the above text.

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* By "both texts" is meant the above, and the text of MANU already cited at page 430.

† See *Dá. Kra. Sang.*, Chap. IV, Sect. ii, § 10, 11.

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Interpretation. The gains of science are explained by KÁTYÁYANA, thus:—"What is gained by the solution (of a difficulty,) after a prize has been offered, must be considered as acquired through science, and is not included in partition (among co-heirs.) What has been obtained from a pupil, or by officiating as a priest, or for (answering) a question, or for determining a dubtful point, or through display of knowledge, or by (success in) disputation, or for superior (skill in) reading (*the Vedas,*) the sages have declared to be gains of science, and not subject to distribution. The same rule likewise prevails in the arts; for the excess above the price (of the common goods,) and what is gained through skill by winning from another a stake at play, must be considered as acquired by science, and not liable to partition: so VRIHASPATI has ordained."*—*Dá. Bhá.*, Chap. VI, Sect. ii, § 1.

KÁTYÁYANA further says:—"Wealth gained through science, which was acquired from a stranger, while receiving a foreign maintenance, is termed acquisition through learning."†

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* *By the solution (of a difficulty)*—As where one agrees with another. 'If you solve this well, I will give you so much money': after such an offer, if one solve the difficulty and obtain the prize, it is not subject to distribution. '*From a pupil*'—that is, what is received from one to whom instruction has been afforded; or what the pupil, studying the texts of *Tantras*, gives for the worship of the gods, or similar purposes; or what a student, coming to read the *Vedas*, gives as a mark of respect to his preceptor. '*By officiating as priest,*'—that is, what is received as a fee or gratuity from a person employing him to officiate at a sacrifice: these are fees, not presents; for they are similar to wages or hire; or what is given during sacrifice as a pious oblation to the gods, or as a mark of respect for the officiating priest. '*For (answering) a question*'—that is, a question relative to science being solved, if any one, through satisfaction, give any thing which had not been previously offered. '*For determining a doubtful point*'—that is, for determination on a question, proposed with a view to the removal of doubt, and in this form: 'I will give this gold or other consideration to him who dispels my doubt on this point of the *Shástra;* or a fee such as the sixth part or the like received for a correct decision between two litigant parties who apply for the determination of a dubious and contested point.' '*Through display of knowledge*'—that is, what is received as a present or the like for luminously displaying his knowledge in the sacred ordinances and so forth. '*By (successes in) disputation*'—that is, what is gained by surpassing the opponent in a contest between two persons respecting their knowledge of sacred ordinances, or in any other controversy whatsoever concerning their respective attainments. '*For superior (skill in) reading*'—that is, what is received for reading in a superior manner where a single article is to be given, and there are many competitors. '*In arts*'—that is, what is gained by painters, gold-smiths, and other artists, through skill in the arts and so forth. '*For the excess above the price,*'—that is, what is gained by getting common gold, &c, and making earrings, &c., above the value of the gold, &c., by the exercise of art. And also what is won by beating another at play: all these are gains of science, and indivisible with the rest.—Vide *Coleb. Dá. Bhá.*, Chap. II, Sect. ii, § 1—14; *Dá. Kra. Sang.*, Chap. IV, Sect. i, § 14—23; *Coleb.* Dig., Vol. III, pp. 336—339; and SHRÍ-KRISHNA'S Commentary on the *Dáya-bhága, Sans.*, pp. 140, 141.

† According to JÍMÚTA-VÁHANA and the rest, the circumstance of receiving oreign maintenance while taught by a stranger is not, however, a requisite

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The word 'science' (*Vidyá*) signifies the military science, and the science of music and art, as well as learning. Hence,— Remark.

474. What is earned, without the aid of joint funds or labour, through military science, art, music or the like not learned at the expense of joint funds or from any member of the joint family, is not divisible among the co-heirs, but is the exclusive property of the acquirer himself. *Vyavasthá.*

Vide Precedents, page 677.

BHRIGU says:—"The same rule likewise prevails in the arts, for the excess above the price *of the common goods,*" &c.—See *Vi. Chí.*, p. 252. Authority.

In *liberal* or *elegant* arts also, what is gained by the display of such peculiar qualities is the acquisition of skill in arts. The law is likewise the same in regard to the science of music and the like: the legislator declares it so in respect of the mercantile profession; "and the law is the same in regard to an increase of price."—*Coleb.* Dig., Vol. III, page 338. Authority.

So what is gained by painters, gold-smiths and the rest, through superior skill in *liberal* or *elegant* arts, and even that which is gained by victory over another in gaming or the like, all that is exempt from participation with others. The meaning is, that wealth gained by superior attainments in any *art* or *science,* belongs exclusively to him who acquired it. For the sake of elucidation, KÁTYÁYANA has delivered the precept diffusively. (See the last page.)—*Ibid.*, page 336. Recapitulation.

PRAJÁPATI says:—"Wealth gained by science, valour or labour, a present made as a mark of respect (*Mádhu-parka*), a present from a friend or a gift at nuptials to a brother: these cannot be divided by the other brothers."—Vide *Smri. Chan.*, Chap. VII, § 31. Authority.

NÁRADA:—"Three sorts of wealth are in general not subject to partition: what is gained by valour, what is given by the kinsmen of a wife, and what is acquired by learning; and also anything that has been received by favour of the father (or other friend.)"—*Coleb.* Dig., Vol. III, p. 343.

How being gained by valour a property becomes impartible to the co-parceners is thus described by—

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condition for the wealth gained through science being indivisible, inasmuch as an expenditure for food and so forth is not considered as being designed or used for the acquisition of wealth. See *ante*, page 433.

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Authority. KÁTYÁYANA :—"When a *soldier*, despising danger, performs a gallant action and favour is shown to him by his lord pleased with that action, whatever property is then received by him shall be considered as gained by valour. That and what is taken under a standard are declared not to be subject to distribution.—What is seized *by a soldier* in war after risking his life for his lord, and routing the forces of the enemy, is named spoil under a standard."—*Dá. Bhá.*, Chap. VI, Sect. ii, § 20.

Vyavasthá. **475.** A habitation, a garden or the like, which has been constructed by one of the co-heirs, within the premises belonging to the dwelling house, during the life-time of the father, is also indivisible: for it is fair to presume, that as the father did not prohibit, he permitted it.—This is likewise to be understood, supposing another of the heirs, to have constructed a similar habitation or the like, within the premises of another dwelling house (belonging to the father.)—*Dá. Kra. Sang.*, Ch. IV, Sect. ii, paras. 29, 30.

Authority. A house, garden or the like which one of the co-heirs had constructed within the site of the dwelling place, during the father's life-time, remains his indivisible property.—*Dá. Bhá.*, Chap. VI, Sect. ii, § 30.

Vide Precedents, pages 689, 699.

Vyavasthá. **476.** Movable property received in gift through affection from a father or grandfather previously to partition is not divisible among the co-heirs.

Authority. VYÁSA :—"What is given by a paternal grandfather, or by a father, as a token of affection, belongs to him (who receives it): neither that, nor what is given by a mother, shall be claimed by co-heirs."*—*Coleb.* Dig., Vol. III, p. 344.

Authority. YÁJNAVALKYA :—"By favour of the father clothes and ornaments are used, but immovable property may not be assumed even with the father's indulgence."—See *Mit.* In., Chap. I, Sect. i., § 21.

Remark. This text must be said to be prohibitory of the gifts of immovable property before partition.—See *Vi. Mi.* Sans., pp. 160, 161.

Remark. Likewise, the prohibition against the division of what has been given by a father through affection is also to be disregarded in the case of immovable property; it being

* See *Dá. Bhá.*, Chap. VI, Sect. ii, § 34.

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declared by VRIDDHA YÁJNAVALKYA :—"By the affectionate gift of the father, the clothes and ornaments are gained, but immovable property is not gained even with the father's indulgence."—See *Smri. Chan.*, Chap. VII, § 48.

VRIHASPATI declares *that* to be impartible, which has been given by the father or other [person]: "That which may have been given, either by the paternal grandfather, or by the father, as well as by the mother, is not to be taken back, any more than that acquired by valour, or the wealth of a wife." See *Vyav. Mayú.*, Chap. IV, Sect. v, § 11. Authority.

See the text of NÁRADA at page 437.

As respects gift by a mother, NÁRADA declares:—"This law is also observed in the case of him to whom any thing has been given by his mother through affection, out of her own several property, for, as a father, so has a mother, power (over her own.)"* Remark.

"This law" means the law stated in the case of an affectionate gift by a father.* Explanation.

"A mother has power *over her own*;" this regards female property. Thus the *Ratnákara*.—See *Coleb.* Dig., Vol. III, page 369. So,— Interpretation

477. What is given by a mother through affection out of any sort of her *stri-dhana*, excepting only the immovable property given by her husband, is not divisible among her other children. *Vyavasthá.*

Vide Precedents, page 614.

Because, save and except the immovable property received from her husband the mother has full power over both sorts of her peculium (*stri-dhana*). See *stri-dhana*. Reason.

478. Property received from a female as a *stri-dhana* is, with the above exception, always impartible. *Vyavasthá.*

As for *stri-dhana*, the same author (KÁTYÁYANA) states that all kinds of *stri-dhana* are impartible. "Whatever is presented at the time of nuptials to the bridegroom, belongs entirely to the bride and shall not be shared by the kinsmen. The gains of valour and of science as also what is considered *stri-dhana*: these are also not liable to partition by the co-heirs at the time of division."—*Smri. Chan.*, Chap. VII, Cl. 22. Authority.

* *Vide* Coleb. Dig., Vol. III, p. 344.

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Vyavasthá. **479.** A *Rájj* or principality is indivisible according to the immemorial custom: the eldest succeeds to the entire *Rájj*, unless he be unfit, when the next qualified brother would do so.*

Vide Precedents, pages 694, 695.

Vyavasthá. **480.** Great possessions called *Zamindáris*, in official language, are considered as tributary principalities, and, as such, they are indivisible.*

Vide Precedents, pages 324—341, and 695, 693.

Special things exempt from partition are as follow:

Vyavasthá. **481.** Clothes, vehicles, ornaments, prepared food, water, women, furniture for repose or for meals, a place of worship, property dedicated for the worship of a deity and a field, are not divisible.

Vide Precedents, pages 690—693, and 298—320.

Authority. MANU and VISHNU.—"Clothes(*f*), vehicles(*g*), ornaments (*h*), prepared food [*Kritánnum* (*i*)], water(*j*), women(*k*), and furniture for repose or for meals (*l*,) are declared not liable to distribution."†

Annotations.

481. As to things *specially divisible*, they are distinguishable from such as are *impartible*, in that the latter are so upon the grounds that have been stated, the former, in point of fact being of a nature to render division inconvenient, if not, as is often the case, impracticable; and for which, therefore, a virtual partition is substituted, where a direct one cannot easily, if at all, be had. Such are a road, a way, pasture for cattle, or a well; with other instances that have been already incidentally noticed; and of which the number and kind are indefinite, liable to be modified by custom whether local, or applicable to a particular class or community.—Stra., H. L, Vol. I, (F. E.,) p. 197.

Upon this ground rests the exemption of the clothes and jewels of the different members of the family, whether male or female; but it is confined to such as have been usually worn; habitual wear (says JAGAN-NÁTHA) being considered as a mode of acquisition.—Stra., H. L., Vol. I, p. 186.

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* See *ante*, pages 120—122.

† *Dá. Bhá.*, Chap. VI, Sect. ii, § 23. *Dá. Kra. Sang.*, Chap. IV, Sect. ii, § 13.

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VYÁSA.—A place of sacrifice (*m*,) a field, a vehicle, dressed food(*i*), water(*j*) and women(*k*), are not divisible among kinsmen, though (transmitted) for a thousand generations.* Authority.

(*f*) '*Clothes.*' Personal apparel and raiment intended to be worn at assemblies.*—*Dá. Bhá.*, Chap. VI, Sect. ii, § 24. Explanation.

(*g*) '*Vehicles.*'] Carriages or horses and the like.*—*Ibid.*

(*h*) '*Ornaments.*'] Rings and so forth.*—*Ibid.*

(*i*) '*Prepared food.*'] Sweetmeats, &c.*—*Ibid.*

(*j*) '*Water.*'] Contained in a pond or well; as suited to use.*—*Ibid.*

'*Water*'—'In wells or tanks.' The water contained in wells or tanks, which has all along belonged to the father and the rest, is not divisible like other property: but must be taken by each co-heir according to his exigency; for the text of VRIHASPATI declares:—"the water of wells and tanks must be drawn up and used by turns.'—*Dá. Kra. Sang.*, Chap. IV, Sect. ii, § 18.

(*k*) '*Women.*'] Other than female slaves.—*Dá. Bhá.*, Chap. VI, Sect. ii, § 24.

Since the partition of a female slave is (thus) directed by VRIHASPATI—"A single female slave should be employed in labour, in the houses of the several co-heirs successively, &c."

(*l*) '*Furniture for repose* or *for meals.*'] Beds, and vessels used and eating or sipping (or drinking) and similar purposes.*—*Ibid.*

(*m*) '*A place of sacrifice*'] That is, where sacrifices are made or an image of a god is placed, not wealth obtained by sacrificing; for that has been noticed as being the earning of science.*—*Dá. Kra. Sang.*, Chap. IV, Sect. ii, § 21.

482. A path for cows, the carriage road, clothes or any thing worn on the body, dwelling house, water-pots, ornaments, things not of general use, and channels for draining water are not divisible.* *Vyavasthá.*

KÁTYÁYANA:—A path for cows, a carriage road, clothes, and any thing which is worn on the body, should not be divided; nor what is requisite for use (*n*,) or intended for arts: so VRIHASPATI declares.—*Dá. Bhá.*, Chap. IV, Sect. ii, para. 27. Authority.

* See *Dá. Kra.*, *Sang.*, Chap. IV, Sect. ii, § 14, 17, 19; and *Coleb.* Dig., Vol. III, pp. 344, 373—385.

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Illustration. *(n)* '*Requisite for use.*'—What is fit for each person's use, as books and the like* in the study of the *Vedas*, &c., that shall not be shared by ignorant brethren. So what is adapted to the arts, belongs to the artists; not to persons ignorant of the particular art.†—*Ibid.*, § 28.

Vyavasthá. **483.** Therefore, books must not be taken by the ignorant parceners; they belong to those of them who are learned. But the ignorant parcener must receive from the learned parcener some other article, equivalent to the share of the books, to which he is (otherwise) entitled, or else the value itself thereof.—*Dá. Kra. Sang.*, Chap. IV, Sect. ii, paras. 23, 24.

Illustration. For, if it be assumed that the ignorant parcener has no right whatever in the books, then, supposing books only to constitute the common property, when a partition took place, the ignorant parcener would entirely be deprived of his share. This is, however, inadmissible, since, it would be at variance with the text which declares:—"They who are born, they who are yet unbegotten, and they who are actually in the womb, all require the means of support: and the dissipation of their hereditary maintenance is censured."—*Ibid.*, § 24, 25.

Illustration. In like manner, whatever is adapted to the exercise of the arts, should belong to those of the heirs who are artists, and not to the unskilled.—*Ibid.*, § 27.

The rule above stated holds equally good in this instance.†

Authority. SHANKHA and LIKHITA.—"No division of a dwelling takes place; norof waterpots, ornaments (*p*), and things not of general use (*o*), nor of women (*q*), clothes, and channels for draining water: PRAJÁPATI has so ordained."†—*Dá. Bhá.*, Chap. VI, Sect. ii, § 29.

Interpretation *(o)* '*Things not of general use*'] As books for illiterate persons and so forth.—SRÍ-KRISHNA'S Commentary on the *Dáya-bhága.*—See *Dá. Bhá.*, Chap. VI, Sect. ii, Annotation 29.

Vyavasthá. (*p*) **484.** The ornaments worn by each person are exclusively his. So says MANU:—"Such ornaments, as are worn

* As books, &c.—That is, if there be other effects of equal value with the books, these shall be retained by the learned brethren; and other chattels, shall be taken by the illiterate co-heirs, this must be inferred. Else, if the hereditary property consist in books only, the illiterate heirs might be deprived of subsistence, if they had no right of participation.—SRÍ-KRISHNA'S Commentary on the *Dáya-bhága, Sans.*, p. 145.

† See *Dá. Krá. Sang.*, Chap. IV, Sect. ii, § 22, 28; and *Coleb.* Dig., Vol. III, pp. 373—385.

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by women during the life of their husband, the heirs of the husband shall not divide among themselves: they who do so, are degraded from their tribe."—Chap. IX, *v.* 200.

It appears from the condition here specified ("Such ornaments as are worn") that those, which are not worn may be divided. Remark.

(*q*) The women or female slaves, being unequal (in number, to the shares), must not be divided by the value, but should be enjoyed in labour (for the co-heirs) alternately. Thus— Further exposition.

VRIHASPATI :—Let a single female slave be successively employed by co-heirs in their respective houses, according to their several shares; if numerous, the slaves shall be distributed in equal allotments; such is the law in respect of female servants.—*Ibid.*, page 379. *Vyavasthá.*

GOUTAMA :—"A female slave shall belong to the parcener by whom she is possessed. But if many be possessed by one parcener, and none by another, the number must be made equal." This must be considered as the settled law respecting female slaves.—*Ibid.*, pp. 380, 381. Exposition.

Women (adulteresses or others) kept in concubinage by the father must not be shared by the sons, though equal in number. For the text of GOUTAMA prohibits it. "No partition is allowed in the case of women connected (with the father or with one of the co-heirs)."—See *Mit. Inh.*, Chap. I, Sect. ii, § 22. Authority.

(*g*) '*Kritánnam*, or Dressed rice.'*—JÍMÚTA-VÁHANA expounds the term (*kritánnam*) sweetmeats or the like. The *Ratnákara* explains it 'flour or similar things;' the *Párijáta* expounds it 'rice or other food.' In fact, all these interpretations should be admitted; for all may be comprehended under the term "and the like."—*Coleb.* Dig., Vol. III, p. 374. Consequently,— Authority.

485. Whatever has been provided by a father for the food of his own son and daughter, or other relative, is exempt from participation.—*Ibid.* Interpretation

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* *Ante*, page 440.

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SECTION III.

Effects liable to Partition.

Vyavasthá. **486.** Effects which are ancestral, paternal, joint or common, are divisible among the co-heirs or co-parceners in proportion to the extent of the right of each.

Vyavasthá. **487.** Property anyhow acquired jointly by the co-heirs, or by a parcener with the aid of joint property or labour or of both is divisible among them all, while what is acquired by any of the parceners with the aid of another, is partible among them only.*

Vide Precedents, pages 695—698, 709—714.

Authority. KÁTYÁYANA.—What belonged to the paternal grandfather, to the father, and any thing else (appertaining to the co-heirs, having been) acquired by themselves (*a*), must be divided at a partition among co-heirs.*

Explanation. *(a)* 'Acquired by themselves.'] Acquired with the use of the paternal or other common wealth; for, an acquisition without the use of such wealth is indivisible.†

Authority. VYÁSA :—The brethren participate in that wealth which one of them gains by valour or the like, using any common property, either a weapon or a vehicle: to him two shares should be given, but the rest should share alike.*

YÁJNAVALKYA :—"Whatever else is acquired by the co-parcener himself, without detriment to the father's estate (*b*),—as a present from a friend, or a gift at nuptials,—does not appertain to the co-heirs. Nor shall he, who recovers hereditary property, which had been taken away, give it up to the parceners: nor what has been gained by science.—See *ante*, page 434.

Annotations.

486. Wherever there has existed a use of the joint funds, or a common exertion of the co-heirs, in either of which cases the acquisition is partible, the acquirer takes a superior share.—*Stra.*, H. L., Vol. I, (F. E.) pp. 195, 196.

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* See *Dá. Kra.*, Sang., Ch. IV., Sect. i, § 1—6. *Dá. Bhá.*, Ch. VI, Sect. i, paras. 1 and 14.

† See *Smri. Chan.*, Chap. VI, Cl. 2, and *Dá. Bhá.*, Chap VI, Sect. i, § 2.

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(b) Here the phrase, any thing acquired by himself without detriment to the joint estate, must be everywhere understood. Consequently,— Explanation.

488. What is obtained from a person, as the return of an obligation conferred at the charge of the joint funds and what is received at a marriage concluded in the form termed *ásura* or the like,* *all that must be shared* with the whole of the brethren or co-heirs. *Vyavasthá.*

489. Property acquired through science learnt at the expense, or from a member, of the joint family, even though it be gained without any aid from the family, as well as that which is obtained by science with such aid is divisible among all the co-parceners;—while the property acquired without the family aid through science not learnt from a member, or with the aid, of the family, is divisible *only* among the co-parceners who in learning are equal or superior to the acquirer. *Vyavasthá.*

Vide Precedents, pages 677, 697, 698.

The rest of the brethren can only claim shares of that wealth, for the acquisition of which money was expended out of the family estate, or which was acquired by learning attained through the instructions of the father with a maintenance provided out of the patrimony.—*Coleb.* Dig., Vol. III, page 341. Authority.

Every kind of wealth gained through learning and the like, being acquired by the man himself, is, without distinction, exempt from partition, if the patrimony have not been used; but if that be employed, the rest of the brethren are specially entitled to receive the shares which will be mentioned: and that is true, without exception, in every case of wealth acquired by learning.—Coleb. Dig., Vol. III, page 339. Authority.

KÁTYÁYANA:—"Yet VRIHASPATI has ordained, that wealth shall be partible if it was gained by learned brothers who were instructed in the family by their father, or by their paternal grandfather *(or uncles)*; and it is the same if the wealth was acquired by valour, or *with assistance from the family-estate.*"—*Ibid.*, p. 340. Authority.

* See *Vyavasthá's* 473, 499 and the authorities, &c., relative thereto.

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Authority. NÁRADA :—A learned man need not give a share of his own acquired wealth, without his assent, to an unlearned co-heir: provided it were not gained by him using the paternal estate.*

Interpretation and Authority. The word 'paternal' intends joint property. What has been gained by him without using that, a learned man need not give up, against his will, to an unlearned co-heir. But to a learned or instructed co-heir he must give a share of any thing acquired by him even without the use of joint property. Accordingly GOUTAMA says,—"His own acquired wealth a learned man need not give up, against his inclination to unlearned co-heirs."*

Authority. Wealth however acquired by science and such other means without the use even of joint funds, must be shared with parceners equally or more learned, not with less learned or unlearned parceners.† So says—

Authority. KÁTYÁYANA :—No part of the property, which is gained by science, need be given by a learned man to his unlearned co-heir: but such property should be yielded by him to those who are equal or superior in science.†

Conclusion. Therefore, an acquisition made by science imparted by others than a father or uncle, and the rest (of the acquirer's own family), and without the expenditure of the joint-stock, must be shared with parceners, more or equally learned, but not with those who are less so, or who are wholly ignorant.†

Remark. The word *Vidyá* derived from '*vid*' (to know) signifies not only learning and military science, but also art and music; or the like; so all these being *vidyás*, are denominated "*vidyá*" with their special names prefixed; as *Shástra-vidyá* (learning), *Shastra-vidyá* (military science), *Shilpa-vidyá* (art), and *Sangíta-vidyá* (music), &c. Hence,—

Vyavasthá. **490.** The acquisition made by art, music, or the like is also divisible if it were learnt from a mem-

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Annotations.

489—490. As to gains by *science*, the rule applicable to these embraces a variety of particulars, the root '*vid*' from which the

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* *Dá. Bhá.*, Ch. VI, Sect. i, § 16, 17, 19.

† *Dá. Kra. Sang.*, Chap. IV, Sect. i, § 7 and 25.

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ber of the family, or at the expense of the family-funds, or if such acquisition was made with the use of joint property.*—

Vide Precedents, page 272. See *ante*, pages 244, 246.

In liberal or elegant arts also, what is gained by the display of such peculiar qualities is the acquisition of skill in arts. The law is likewise the same in regard to the science of music and the like: the legislator declares it so in respect of the mercantile profession; "and the law is the same in regard to an increase of price" (cccxlvii), What is the law respecting the military profession,—is that unnoticed? To this MISRA replies,—"science" signifies both arms and sacred literature: consequently it is noticed; and the acquisition of science must be also understood in case of arms.—*Coleb.* Dig., Vol. III, p. 338. Hence,— Authority.

Annotations.

Sanskrit word *Vidyá* (science) is derived, signifying any knowlege or skill. "In fact (says JAGAN-NÁTHA), in all cases whatsoever, wherein superior skill is required, the wealth gained is technically denominated "the acquisition of science." Hence, beside what may be gained by it in its more direct and appropriate sense, it includes what is received by a teacher from his pupil, or by a priest, or from those for whom he has officiated; a fee for an opinion in law, or upon any other subject on which the receiver may have been professionally consulted; a literary prize or a reward for reading in a superior manner; not to mention what is won at play. It extends also to the liberal and elegant arts, among which working in metals, long practised in the East, is enumerated, with music and painting. Thus having taken gold, for instance, and made it into bracelets, the ornament, so far as respects the material, is common and partible; while the value, superadded by the skill of the artist, regarded as an acquisition made through science, is subject to the rule applicable to that particular subject.—Stra. H. L., Vol. I, (F. E,) p. 194.

490. Science signifies both military and sacred science.—The meaning of the above is that wealth, gained by science, shall be divided amongst the brothers, provided *that science* was obtained from the father and others—*Vi. Chi.*, pp. 251, 252.

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* See *ante*, pages 455, 436.

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Vyavasthá. **491. What is gained by valour* with the assistance of the joint property or labour is divisible among the parceners rendering such assistance.**

Vyavasthá. **492. The property which a co-parcener has earned by science or art without the family aid (though otherwise impartible) is to be shared by the co-heir or co-heirs who supported the acquirer's family during his absence to study science, be the supporter or supporters ever so ignorant.**

Authority. But if during the period of acquisition of a science by one brother another brother should, through his own personal exertions and the means of his individual wealth, support the family of such brother, then, even though utterly ignorant, he is entitled to a share of the wealth which his (acquiring) brother had gained by means of science.—*Dá. Kra. Sang.*, Chap. IV, Sect. i, § 9.

Authority. If the support were afforded by two or by three unlettered co-heirs, then all these shall participate.—SRÍ-KRISHNA'S Commentary on the *Dáya-bhága.*—See *Dá. Bhá.*, Chap. VI, Sect. i, § 15 Annotation.

Authority. NÁRADA:—He who maintains the family of a brother studying science, shall take, be he ever so ignorant, a share of the wealth gained by science.†

Authority. Since the term "maintained" is exhibited in the singular number, if the family of the brother who is studying science, be made to prosper by another brother at the expense of his own wealth, or by the labour of his body, then he also has a title to the property gained by that science.—*Dá. Bhá.*, Chap. IV, Sect. i, § 15.

Annotations.

491. With respect to gains by *valour*, falling under the same consideration, by these, technically understood, is not meant military pay, which, as to its partibility, is not distinguishable from any other ordinary acquisition; but such, where extraordinary prowess has been displayed; being resolved by MANU, and others, into the reward of a gallant action in the field, or into spoil taken under a standard, after a rout of the enemy; of which latter it is remarkable, that as with us it does not vest without the assent of the king.—Stra. H. L., Vol. I, (F. E.,) p. 195.

* See *ante, pages* 537, 438.

† *Dá. Bhá.*, Chap. VI, Sect. i, § 14.—*Dá. Kra. Sang.*, Chap. IV, Sect. i, § 9.

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The ignorant brother shall share what may be earned by that science, during the study of which he maintained the family of his brother, not wealth gained by any other science.—*Coleb.* Dig., Vol. III, p. 361. Authority.

In this place, the whole of the acts from the commencement until final completion must be implied: consequently, the ground of participation is the maintenance afforded to the family during the same period, corresponding day by day with that during which the whole of the several acts of reading and studying the science did pass. "The word being expressed in the singular number, &c.;" then, if two brothers maintain the family by their own labour, and with their separate property, what should follow? They shall receive their due portions of a single share. Both are expressed by a term in the singular number; as the male and female buffalo, or male and female elephant, are denoted by single words.—*Coleb.* Dig., Vol. III, page 362. Illustrations.

By parity of reasoning, as well as on the ground of rendering material assistance,—

493. The brother or brothers who maintained, and *not merely looked after*, the family of a brother *Vyavasthá.*

Annotations.

493. The Hindú law of partition contains one anomaly, which would at first sight appear unjust and absurd. I allude to that rule which entitles an idle brother to claim a share of the acquisitions of his industrious brethren,—the drone to participate in the labours of the hive. But when the particular constitution of the Hindú society is considered, this provision will not be found to be altogether repugnant to justice or to reason. No respectable Hindú would travel in quest of employment without providing sufficient protection for the females of his family; and the individual usually selected for this purpose is one of the brethren, who resides without any active employment in the family house, while the rest go in quest of service, and not unfrequently amass immense wealth, while the brother left behind has not advanced one step from his original state of poverty. But it would be hard to deny him a share of the good fortune which had attended his brethren, since it is evident, that unless some one performed the part which he undertook, they could not have acquired the wealth, and he may, therefore, be fairly held to have contributed his aid towards the acquisition. It might also be affirmed, that had he been engaged

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gone abroad for the acquisition of wealth, is entitled to share such acquisition of that brother.

Vide Precedents, pages 682—684.

Authority. The above is conformable to the maxim "The sense of the law, as ascertained in one instance, is applicable in others also, provided there be no impediment."—See *Dá. Bhá.*, Chap. III, Sect. ii, Annotation 31.

Vyavasthá. **494.** Ancestral movable property recovered from a stranger by a parcener other than the father with the aid of the joint funds or labour, or without the acquiescence or privity, or in fraud, of his co-parcener, is divisible between them.*

Authority. *Vide* Precedents, pages 668—672 716.

Authority. The texts of MANU, YÁJNAVALKYA and VRIHASPATI cited at pages 430, 434, 435.

Remark. The rule laid down in the above mentioned texts must be understood in the instance of any such hereditary property, other than land, which anyhow recovered becomes common and divisible among all the co-parceners.—See *Dá. Bhá.*, Chap. VI, Sect. ii, § 37.

Annotations.

in a more active occupation, the same success would also have attended his endeavours.—Macn., H. L., Vol. I, Preliminary Remarks, pp. xiii, xiv.

Next, as to *property recovered;* at whatsoever time lost, and referable to whatsoever title, so it be family property, being redeemed, without use of the common stock, it belongs exclusively to the recoverer, notwithstanding the former right. The recovery, however, according to some authorities, must have been with the privity of the co-heirs, unless there appear to have been an abandonment by them, of which silent neglect on their part may be evidence. It must at least have been *bonâ-fide*, that is, not in fraud of their title, by anticipating them in their intention of recovering it. Still less would it be available to exclude partition, if persued in the face of an express injunction on their part.—*Stra.* H. L., Vol. I, (F. E.) pp. 193 and 194.

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* See *ante*, pages 428, 432.

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495. Ancestral *land* usurped by a stranger, but recovered by a parcener (who is not the father of the rest,) is always divisible between him and his co-parcener, no matter whether the recovery was made with or without the joint family aid or the acquiescence of the co-parcener. *Vyavasthá.*

Vide Precedents, pages 668—672, 703, 716.

The father, if unwilling, shall not share with his sons his paternal property, which was seized by strangers but which he recovered. This is ordained by MANU and VISHNU:—"If the father recovers paternal wealth (seized by strangers and not recovered by other shares, nor by his own father) he shall not, unless willing, share the same with his sons,—it was acquired by himself." The construction is, that he shall not share it with his sons, because it was, as it were, acquired by himself.—*Dá. Ta.*, Chap. II, § 7. Authority.

But as regards the case of recovery by any other (than the father), the law is propounded by the text of SANKHA to be (presently) cited. This follows from the logical interpretation of two provisions, one of which is general, and the other special.—*Ibid.*, § 8. Authority.

SANKHA:—Land inherited in regular succession, but which had been formerly lost, and which a single (co-heir) shall recover solely by his own labour, the rest may divide according to their due allotments, having at first given (him) a fourth part.* Authority.

By the term 'solely' the author intimates, that neither common funds were used nor joint personal exertions made. Still it does not become the separate property of the person retrieving it: but a fourth part of the land recovered must be given to him in addition (to his regular allotment:) by force of the word '*land*;' and because there is no reason for supposing it to be vague.* Exposition and authority.

Having given a fourth-part of the land recovered, to him who recovered it, let all the rest divide the remaining three shares with *him*, according to the due proportions to which they are entitled, and take their respective allotments.—*Dá. Kra. Sang.*, Chap. IV, Sect. ii, § 9. Explanation.

Annotations.

495. The rule is the same with respect to property recovered, excepting land, of which the party recovering it is entitled to a fourth more than the rest of his brethren.—Macn., H. L., Vol. I, page 52.

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* *Dá. Bhá.*, Ch. VI, Sect. ii, § 37, 38, 39.—See *Dá. Kra. Sang.*, Chap. IV, Sect. ii, § 9.

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Vyavasthá. **496.** Should a member of a joint family (be he or not the manager of its estate) augment or improve the joint estate, he is not entitled to the whole of the augmentation, but it is divisible among all the co-parceners.

Vide Precedents, pages 673—676, 698, 702.

Vyavasthá. **497.** Any property which is earned, held or passed in the name of a member of an undivided family, though appearing on the face of it impartible, is divisible among the other members who are co-heirs, unless the same is proved by the former to have been separately acquired by him without the use of the joint funds or labour or of both.

Vide Precedents, pages 697, 698, 709—912, 714, 715, 736.

Vyavasthá. **498.** Immovable property affectionately given by a father, or father's father does not become the sole property of the donee, but is divisible among the donor's heirs. See *ante*, pages 438, 439.

Authority. VRIDDHA YÁJNAVALKYA :—"By the affectionate gift of the father, the clothes and ornaments are gained, but immovable property is not gained even with the father's indulgence."

Vyavasthá. **499.** Property received by a co-parcener in gift, with a view to a return to be made out of the joint family estate is partible among the co-parceners.*

Annotations.

499. But with regard to a gift, in order to its vesting separately, it must have been pure in its motive, and personal in its object; for, if it were in return for something previously given, it would be liable to be considered as common property, common property having been used in obtaining it. Not that wherever there have been mutual gifts, the gift to the co-parcener is necessarily partible. It depends upon whether the one have been in consideration of

* See *ante*, page 245.

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If any thing have been given to a friend, and he, accepting the present, make a return to the giver, that also is exempt from partition; for the present was not made in expectation of a return. But if such expectation were entertained, then, according to the opinion of CHANDESHWARA and others, a distribution of the thing received must be admitted; for the term, "given by a friend," signifies 'on account of friendship;' now this was not received from him on account of affection, but on account of a gift made.—*Coleb.* Dig., Vol. III, p. 363. Authority.

If a man make a present exceeding his means, through mere avarice, on pretence of affection, in the expectation of receiving a greater return, or with intent to defraud his co-heirs, whatever shall be given to him by his friend, is partible: common sense supports this inference.—*Ibid.*, page 363. Illustration.

In like manner, if any thing be given by a pupil jointly instructed or by a votary, or any other person so connected with all the parceners, in consideration of that very relation, the rule of decision is the same; yet if it were given by persons whose acquaintance originated in that relation, but in consideration of the good qualities of the donee, it should not be distributed among all the co-heirs, although the acquaintance arose from such a connection, because this was not the motive of the gift.—*Ibid.*, p. 358. Illustration.

500. The personal property and private estate of a *Rájá*, or of a great *Zamindár*, are distributable *Vyavasthá.*

Annotations.

the other—a present made, with a view to a return. A gift under such circumstances loses the nature of one; *do ut des*, it is too like a contract, the result of which is common. *Nuptial* gifts, which a man receives with his wife, are particularly noticed as exclusively his; which is the more remarkable, as the funds of the family must bear the expenses of the marriage; but, as already intimated, this does not render them partible, the expenditure being incidental only. So, as to what is received at marriage, in the form termed *ásura*, at which presents are made by the bridegroom to the father, or kinsmen, of the bride.—Stra., H. L., Vol. I, (F. E.) pp. 191—192.

500. As to things vesting in an individual of a family in exclusion of other members, the instance of *Regalities* and *Zamindáris* standing upon the same ground, has been already

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among all his heirs, though the *rájˇ* or the *zamindárí* itself be impartible and descendible entire to a single heir.

See pages 244 & 443 of Vol. I, part ii, and pages 282, 283 of Vol. II, Part ii, of the *Vyavasthá-chandriká.*

Special things when liable to partition are as follow:—

Vyavasthá. **501.** Wells, pools or the like *(bápí)*,* if equal in number, are divisible among the co-heirs; but if unequal, or if there is but one well, pool or the like, then the water is proportionately and distributively used.—See *ante*, pages 440, 441.

Vyavasthá. **502.** If there is but one slave in the family, or if there are several slaves but of odd number, then the work of such slave or slaves is proportionately distributed; but if even in number, then they are divided.—See *ante*, pages 440,441.

Annotations.

noticed; of which it has been thought, however, that it is the *ruling power* only that is not subject to division; while the effects and private estate of a Sovereign, like those of any ordinary individual, are in common, and distributable among all the heirs. This seems to be the only instance of the kind, the exception arising from the nature of the thing, sanctioned by custom.—Stra, H. L., Vol. I, pp. 208, 209.

502—506. But, by the Hindú law, clothes of value, as court dresses and the like, worn only on particular occasions, in which all are interested, remain, on partition, as before, for common use, unless sold; in which case, the proceeds are distributable. And, even of common apparel, if one happen to have much more than the rest, the difference must be adjusted, excessive disparity being in all things forbidden. The same principle of appropriation extends to slave girls, with respect to which, where there are in a family several, of whom any of the members have been in the habit of employing one in particular to rub his limbs, or for whatever other purpose, his property in her may be confirmed, when they come to divide; without regard to any accidental difference between her and the others, as to age, strength, or other qualities; pro-

* A large oblong pool or pond commonly called a '*dighí*.'

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503. Where there is a great disparity in the clothes or ornaments, generally worn by the members of a family, there, such articles as well as the valuable clothes and ornaments occasionally worn by them or any of them, are to be divided, in kind, if practicable, otherwise the sale proceeds thereof should be distributed.* *Vyavasthá.*

Vide Precedents, page 703.

VRIHASPATI :—They by whom it is asserted that clothes and the like are indivisible have not thought that clothes and ornaments would constitute collected wealth among opulent men. These must, therefore, be divided by some mode deduced from reasoning; else they would be useless.* Authority.

The same author (VRIHASPATI), therefore, points out the rational mode of distribution of the above things in the following passage:—"By the sale of clothes and ornaments; on the recovery of a written debt; by compensating the dressed food with undressed grain, an equitable partition is made. Water, drawn from a single well, or pool (*bápí*), shall be taken in due proportion. Let a single female slave be successively employed by co-heirs in their Authority.

Annotations.

vided that, upon the whole, the partition be equal. If there be but one, it can only be done by *compensation*. And, where there being but one, there have existed no such appropriation, she may be distributed by computation of time and work *(alternis vicibus)*, like any thing else physically indivisible, and which, therefore, where many are concerned, can only be enjoyed by turns, or in common, subject to specific distribution by means of sale.—Stra., H. L., Vol. I, pp. 211, 212.

Such is the explanation given of "women" in the several texts enumerating that are exempt. They are said to respect the wives of the co-heirs, the female slaves of the family being clearly partible. Upon this ground rests, the exemption of the clothes and jewels of the different members of the family, whether male or female; but it is confined to such as have been usually worn; habitual wear (says JAGAN-NÁTHA) being considered as a mode of acquisition.—Stra., H. L., Vol. I, p. 211.

* See *Mit.* Inh., Chap. I, Sect. iv, § 9.

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respective houses, according to their several shares. If numerous, the slaves shall be distributed in equal allotments. The benefits received from *Yoga-kshema* shall be equally shared, and the pasture ground for cattle shall also be always used by the co-heirs in proportion to their allotments."*—The same law applies also to male servants. See *ante*, pages 27, 28.

Authority. VIJNÁNESHWARA :—Water, or a reservoir of it, as a well or the like, being unequal (to the allotment of shares), must not be distributed (*c*) by means of the value, but is to be used (by the co-heirs) by turns.—See *Mit.*, Inh., Chap. I, Sect. iv., para. 21.

(*c*) '*Being unequal.*'] It is thus hinted, that if the number be adequate, partition takes place.

Vyavasthá. **504.** Clothes worn by the members of a family being (though with exceptions as above) declared indivisible, it is clear that new clothes must be divided among the co-heirs.

Vide Precedents, page 703.

VIJNÁNESHWARA :—But new clothes are subject to distribution*. In like manner,—

Vyavasthá. **505.** Such ornaments as have not been used are held in common, and therefore liable to partition.*

Vide Precedents, page 703.

Authority. VIJNÁNESHWARA :—The ornaments (*d*) worn by each person are exclusively his. But what has not been used, is common and liable to partition.—See *Mit.* Inh., Chap. I, Sect. iv, para. 19.

(*d*) "Ornaments;" not such as have been given through favour, but such as were worn by each. Here again excessive disparity must be avoided. But, if any ornaments remain in the treasury, and are sometimes worn by any one parcener during festivals, such ornaments shall be shared even by him who did not wear them: for it is not understood that these belong exclusively to him who occasionally uses them.—*Coleb.* Dig., Vol. II, p. 373.

Vyavasthá. **506.** Dressed food, if of a large quantity, is equitably divided by compensating it with undressed grain.†

* See *Smri. Chan.*, Chap. VIII, Cl. 43.

† As directed by VRIHASPATI. See *ante*, page 259.

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507. Sacrificial gains (*Yoga-kshema*), a field, bridge, pasture-ground for cattle, and a written debt recovered, are divisible or distributively used in the rational manner. (See *Vyavasthá* 482 and the passages connected therewith.) *Vyavasthá.*

Authority. VRIHASPATI declares a distinction, in regard to clothes and other matters:—"They by whom it is affirmed, that clothes and the like are indivisible, have not proved that the collected wealth of opulent men, their vehicles and ornaments, shall not be divided; property held in common [would be] unemployed, for it cannot be given to one (in exclusion of another): therefore it must be divided by [some mode deduced from] reasoning; else it would be useless. By the sale of clothes and ornaments; on the recovery of a written debt; by compensating the dressed food with [an equal allotment of] undressed grain, an [equitable] partition is made." "Water drawn from a [single] well or pool, shall be taken by turns: Let a [single] female slave be successively employed by co-heirs in their respective houses, according to their several shares: if numerous, the slaves shall be distributed in equal allotments; such is the law in respect of female servants. A bridge and a field shall be shared [by co-heirs] in due proportion: and the pasture ground for cattle shall be used by the co-heirs in proportion to their allotments."—See *Vyav. Mayú.*, Chap. IV, Sect. vii, para. 22.

Authority. VRIHASPATI:—The benefits received from *Yoga-kshema* shall be equally shared, and the pasture ground for cattle shall also be always used by the co-heirs in proportion to their allotments.—*Vide Smri. Chan.*, Chap. VII, Cl. 43.

Remark. The conclusion is, that the gains derived from sacrifices are divisible as also lands, the division of which (lands) is, however, to be made with the assent of all the co-heirs: PRAJÁPATI having declared,—"Whatever act is done in respect of immovable property without the consent of the co-heirs, every such act is to be considered as not done even where one of the co-heirs does not consent." Again the same author (USHANAS) states:—"Partition does not take place of houses, lands, sacrificial gains, and also of what has been given by a father or a mother through affection." The prohibition contained in the above passage against division is, however, to be overlooked, and houses and the like are to be equitably divided in the manner aforementioned. Accordingly, KÁTYÁYANA, by the passage,

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"The visible house, land and quadrupeds are to be divided," expressly permits the partition of houses, &c.—*Ibid.*, Cls. 45—47.

Remark. The exclusion of land from partition as stated by USHANAS ("Sacrificial gains, land, written documents, prepared food, water and women are indivisible among kinsmen even to the thousandth degree);" bears reference to the sons of a *Bráhmana* by women of the military or other inferior tribes: for it is ordained (by VRIHASPATI): "Land, obtained by acceptance or donation, must not be given to the son of a *Kshatriyá* or other wife of inferior tribe: even though his father give it to him, the son of the *Bráhmaní* may resume it, when his father is dead.—*Mit.* Inh., Chap. I, Sect, iv, § 26.

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CHAPTER III.

How Partition is to be made, and Separation effected.

508. Partition is effected by adjusting the rights of the different co-sharers and allotting their shares openly *(a)*, or privately *(b)*. *Vyavasthá.*

Vide Precedents, pages 704, 721, 722.

Sankha and Likhita :—That partition, which is permitted while the father lives, must take place, according to law, either openly (*a*), or privately (*b*).* Authority.

Annotations.

508. As to the *mode of partition* and the *assignment of shares.* It may be made only in the presence of arbitrators; privately, by adjustment; and a third method of ascertaining a separate title is, by casting of lots; upon which it may be remarked, that the above are precisely three out of the four enumerated by our Littleton, as the mode of partition among sisters (co-parceners), at the English common law.—Stra., H. L., Vol. I, (F. E.) p. 119.

468. A on partition by a father, so upon that which takes place after his death, beside the method by casting of lots,† arbitrators may be employed, in which it is public; or, it may be arranged privately among the parties, either with or without the mediation of friends.—*Ibid.*, p. 197.

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* Cited in the *Smriti-chandriká* (Chap. II, Sect. i, Cl. 1) and *Vivádabhangárnava.*—See *Coleb.* Dig., Vol. II, p. 205.

The above text is rendered in 2 Digest, page 205, thus :—" While the father lives, the estate may be divided with his consent, openly or privately, according to law." This version does not seem to agree with the original text, as cited in the *Smriti-chandriká*, for two reasons; 1stly, the Sanskrit word "Anumatah," occurring in the original text, implies "permitted," and goes to qualify "*Vi-bhágah*" (partition), and there is nothing in the original text justifying the insertion of the word "his" in the translation; 2ndly, such a version would militate against the several passages in Chapter IV, which allows partition in many instances during the life-time of the father, against his will, and at the instance of the sons only.

† 2 Dig, p. 518.

‡ Upon the authority of Jagan-nátha, Sir Thomas Strange has, as above, added the casting of lots as the third method of partition. But recourse is

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Explanation. *(a)* 'Openly *(prakásham)*':] That is, in the presence of arbitrators.—*Coleb.* Dig., Vol. II, p. 536.

Explanation. *(b)* 'Privately *(mithah')*] Without the intervention of arbitrators, by mutual adjustment only, but according to law.—*Ibid.*

Vyavasthá. **509. Partition made in any of the above modes may be effected verbally as well as by an instrument in writing, the latter, however, is held preferable to the former. (See ascertainment of partition in Chap. VI, Sect. ii.)**

Vide Precedents, pages 721, 722.

Authority. VRIHASPATI thus explains the nature of a written record of partition: "That record of partition which brothers *(c)*, *or other co-heirs,* execute after making a just division by mutual consent is called the written memorial of the distribution."—*Coleb.* Dig., Vol. III, p. 408.

Exposition. *(c)* The term "brothers" is an instance of a general meaning; it must *also* be understood of a father when partition is made by him, and of brother's sons and the rest. "After making a just division": this is a matter of course; for, though a writing is also executed when an unfair partition is made, that instrument is in fact unavailing. "By mutual consent:" this intends any one of the parceners; for the consent of all is not requisite in (undertaking) a distribution. That record of partition, or writing declaratory thereof, which they execute, is called 'the written memorial of a distribution. Since the letters traced on the leaf express partition, the leaf itself, mediately by its contents, shows a distribution; or it does so, because that and the writing are considered as inseparable. Again, since VRIHASPATI calls the leaf 'a written memorial of the distribution,' it is proper to write (at the beginning of the instrument) 'this written record of partition;' and since it is called 'an instrument declaratory of a distribution,' such terms should be inserted as to denote partition. For example, it may be written, "I have received from you a sum so and so, and yielded to you sums so and so, as a division of the whole patrimony, to which we have assented." The instrument should be rendered firm by adding "whatever shall be asserted *to the contrary,* is false."—*Coleb.* Dig., Vol. III, pp. 448 and 409.

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and may be, had to this process in the partition made *openly* as well as *privately.* So, not being *of itself* a method which can be adopted independently of the first or second method of partition, it cannot be deemed, as *one* separate from any of them.

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510. Where the number of the sons borne by each of the wives of the late proprietor is equal, the division may be made either with reference to the number of the sons themselves, or with reference to their mothers, and then among them *per capita* when they may wish. *Vyavasthá.*

Vide Precedents, pages 705, 723, 724.

So VRIHASPATI :—"If there be many [sons] sprung from one [father], alike in number, and in class, but born of rival mothers, partition must be made by them, according to law, by the allotment of shares to the mothers."* Authority.

VYÁSA :—If there be many sons of one man, by different mothers, but equal in number, and alike by class, a distribution among the mothers is approved.* Authority.

Annotations.

510. But where the deceased has left *several* widows with sons, more or fewer, by each ; in such case, if the number by each be *equal*, in order to avoid the trouble of a more detailed distribution, the allotment may be made to the mothers, leaving it to them to sub-divide among the sons, instead of dividing to the sons in the first instance ; a mode of division called *Patni-bhâga* or the division by wives, in contra-distinction to *Putra-bhâga*, or the division by sons. In this there appears nothing unreasonable ; but the principle of this mode being that division to the wives is always to be an equal one, its effect becomes very different, where the number of sons by each *varies*. As, if one wife has one son, another three, and a third six, and each wife takes a third of the property, it is evident that the shares of the sons, all by the same father, will be very different : so unnatural a mode of division, therefore, is allowed only among *Shûdras* ; nor even among them, but where there is a *custom* for it, which must of course be strictly proved ; though it is said to prevail in the Southern territories of India as much as did formerly the custom of *gavelkind* in Kent ; thus, to a certain extent, but still in the *Shûdra* class only, superseding the law of the *Shâstras* ; and, to this opinion, the frequency with which references of the kind appear to have been made in the Courts of the Company in the Peninsula, seems to give countenance.—Stra. H. L., Vol. I, (F. E.,) p. 181.

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* *Dâ. Bhâ.*, Chap. III, Sect. i, § 12.

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Authority. Since there is no difference in the sons' shares, for they are equally numerous and of the same tribe, partition is to be made by an allotment to the mother, not to the sons.—*Dá. Bhá.*, Chap. III, Sect. i, § 13.

Authority. GOUTAMA :—A special partition may be made *among sons, by allottiny one share* to each of *their* several mothers, as *shares are usually allotted* to kinsmen.*(d)**

Exposition. (*d*) 'To kinsmen.'] To brethren. When there are four or five brothers, as one share is given to each brother, so, when there are many mothers, who have an equal number of sons, one share shall be allotted to each mother, because it is troublesome to divide the estate among the brothers. Afterwards, a special partition among uterine brothers shall be made by those sons.*

Conclusion. Hence brothers of the half-blood, born of different mothers by the same father, may divide the heritage by making as many shares as there were mothers, provided they be equal in class, and in respect of the number of the sons produced by each mother, and provided every mother have borne sons: and when the sub-division is made, every son receives an equal share. This has been ordained by VRIHASPATI to facilitate partition; there is no real difference. The text of GOUTAMA intends this case alone; for the import coincides.—*Ibid.*, p. 575.

Remarks. In suggesting as above, the policy of the law seems to be that by this process reverence will be shown to the mothers in accordance with the texts which declare that sons are dependent on their parents (1), and at the same time the sons will not be deprived of their legal rights, but each of them will, by the subsequent sub-division, get his legal, *i. e.*, equal share; as otherwise such partition could not have been allowed except where it is legalized by immemorial and invariable custom. Consequently,—

Annotations.

(1) By the texts of VYÁSA and VRIHASPATI† it is directed that division should be made with reference to the wives of the father, —a division declaratory of the mother's supremacy, and not also against my opinion. For according to this, "a son is not independent while the parents live, even though they be infirm," and other texts, one is dependent on his parents even after partition. So, according to those texts, partition (is to be made) with reference to the mothers upon this understanding, that so long as the mothers live, the sons should remain obedient to their command.—*Vir. Mi., (Sans.)* page 178, (New Ed., p. 576).

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* *Coleb.* Dig., Vol. II, p. 572. † Cited in the last page.

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511. If the number of the sons borne by each wife be unequal, then owing to the sons' shares not being ultimately equal the division with reference to their mothers is not allowed, except where it is legalized by custom. *Vyavasthá.*

Vide Precedents, page 705, 723, 724.

VRIHASPATI gives this opposite example:—"Among brothers, who are equal in class, but vary in regard to the number [of sons produced by each mother], the shares of the heritage are allotted to the males [not to their mothers]." See *Vyav. Mayú.*, Chap. IV, Sect. iv, § 26. Authority.

He (VRIHASPATI) also said in regard to the partition of (such sons) if unequal in number:—"For brothers of the same caste but unequal in number, shares for males (*i. e.*, for each son) are prescribed."—See *Mádhavíya Dáya-vibhága*, page 16. Authority.

KÁTYÁYANA:—BHRIGU declared that "whatever customary law of a country, a class of tribe, a company *of merchants and the like* or of a town, should be alleged and proved; the distribution of an inheritance must respectively be made according to that custom."—*Coleb.* Dig., Vol. III, page 376.—See *Dáya-tattwa*, Sans. p. 7. Authority.

512. Partition may be effected either by distributing the produce or income of the estate in proportion to the rights of the several co-heirs, or by dividing the estate itself by metes and bounds, or (in the case of the estate being composed of several articles, parcels and properties) by marking and singling out certain parcels of the above for each share (either by the casting of lots, or without such process, if practicable). *Vyavasthá.*

Vide Precedents, page 704.

Annotations.

512. A family joint in mess is not necessarily joint in estate; nor is a partition by metes and bounds necessary before a division can take place: an agreement amongst the members that the ownership is to be in certain defined shares, takes away the character of joint enjoyment. On the death, without issue, of one of several uterine brothers undivided in estate, the surviving brothers succeed equally to his share.—Shib Narain Bose *versus* Ram Nidhee Bose and others.—Suth. W. Rep., Vol. IX, p. 87.

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Authority. Partition may be of two sorts, namely, the one in which the property remains entire, but the profit of it is divided among the co-heirs. By the other, the property is divided into as many shares as there are co-heirs.—*Vi. Chi.*, p. 303.

Vyavasthá. **513.** Partition may be made either of the entire estate, or only of a particular part thereof.

Vide Precedents, page 29.

Vyavasthá. **514.** In the division of the household articles, things specially of use to a particular parcener or parceners should be allotted to him or to them alone: as books to the learned, tools and implements to the artist, while to the rest must be allotted other articles, making, however, the shares equivalent in proportion to their rights in the whole of the articles or properties.

Authority. What is fit for each person's use, as books *(e)* and the like in the study of the *Vedas*, &c., that shall not be shared by ignorant brethren. So what is adapted to the arts, belongs to the artists; not to persons ignorant of the particular art.—*Dá. Bhá.*, Chap. VI, Sect. ii, § 28.

Conclusion. Therefore, books must not be taken by the ignorant parceners; they belong to those of them who are learned. But the ignorant parcener must receive from the learned parcener some other article, equivalent to the share of the books, to which he is (otherwise) entitled, or else the value itself thereof.—*Dá. Kra. Sang.*, Chap. IV, Sect. ii, § 23, 24.

Exposition. For, if it be assumed that the ignorant parcener has no right whatever in the books, then, supposing books only to constitute the common property, when a partition took place, the ignorant parcener would entirely be deprived of his share. This is, however, inadmissible, since, it would be at variance with the text which declares:—"They who are born, they who are yet unbegotten, and they who are actually in the womb, all require the means of support; and the dissipation of their hereditary maintenance is censured.—*Ibid.*, § 24, 25.

Annotations.

513. Nor is it necessary, where the partition is general, that it should attach upon the whole of the property; a part only may be distributed, keeping what remains for future division, or to descend in a course of inheritance.—Stra. H. L., Vol. I, (F. E.), p. 121.

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(*e*) What is fit for each person's use, as books and the like, in the study of the *Vedas, &c.* That should not be shared by ignorant brethren. So what is adapted to the arts, belongs to the artists; not to persons ignorant of the particular art.—*Dá. Bhá.*, Chap. VI, Sect. ii, § 28. Exposition.

(*e*) As books, &c.—That is, if there be other effects of equal value with the books, these shall be retained by the learned brethren; and the other chattels shall be taken by the illiterate heirs; this must be inferred. Else, if the hereditary property consist of books only, then the illiterate heirs might be deprived of subsistence, if they had no right of participation.—SRIKRISHNA'S Commentary on the *Dáya-bhága*, Sans, p. 145. Exposition.

In like manner, whatever is adapted to the exercise of the arts, should belong to those of the heirs who are artists, and not to the unskilled.—*Dá. Kra. Sang.*, Chap. IV, Sect. ii, Para. 27. Authority.

515. If, however, there are *only* books, tools, or implements of art, then the proportionate value thereof must be paid by way of compensation to the other parceners, who are ignorant of such science or art, or else the whole must be divided in kind among them all. *Vyavasthá.*

KÁTYÁYANA:—Pasture-ground for kine, a common way, apparel, and whatever else is worn on the body, necessary implements of learning *(f), as books and the like used severally,* or of arts(*g*), *as pencils or tools,* are indivisible, according to VRIHASPATI, *but if no other property remain, must be sold, and the price of them must be distributed.—Coleb.* Dig., Vol. III, page 376. Authority.

(*f*) '*Necessary implements of learning.*'] The same term is expounded, 'things required for use, as books or the like:' these shall not be shared by ignorant co-heirs, whether to sell or merely to use them: it is so affirmed in the *Párijáta*, the *Ratnákara*, the treatise of JÍMÚTAVÁHANA, *the Dáya-tattwa*, and other works.—*Coleb.* Dig., Vol. II, p. 378. Exposition.

Annotations.

514, 515. Books, tools, and implements of arts belong generally to those who can best employ them, the rest taking the other parts of the property, unless where the whole consists of nothing else; in which case there must be a general distribution, or a sale, and equal division of the proceeds.—Stra., H. L., (F. E,) pp. 188 & 189.

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Exposition. (*g*) '*Necessary implements of arts;* as pencils and the like' Thus the *Ratnákara.* But HALÁYUDHA explains the word 'arts,' as signifying means of subsistence in general: books, pencils, and tools, required for that purpose must therefore be comprehended by this term.—*Ibid*, p. 378.

Exposition. In the case of books and similar things required for use, all may claim the benefit of them, although they remain in common. In such a case, if one of five brothers be illiterate, he obtains no share of the books; but his son, if learned, may claim the use of them; if he be also illiterate, he obtains no participation.—*Ibid.*, p. 384.

Vyavasthá. **516.** If there be no property, still the members of a joint family may be separated by mutual agreement that they are no longer joint, and may be known and held to be so by their cooking, messing, performing religious acts and ceremonies, and dealing, separately from, or acting independently of, each other.

Vide Precedents, &c., in Chapter VI.

Authority. Even when there is a total failure of common property, a partition may also then be made by the mere declaration, "I am separate from thee." A partition may even be a mere mental distinction. This exposition clearly distinguishes the various qualities of this [term].—*Vyav. Mayú.*, Chap. IV, Sect. iii, § 2.

uthority. What then is the meaning of the term '*partition?*' This question might be proposed, and is thus answered; for it does not mean division of the patrimony, since it would follow that no partition could take place among those who are destitute of inherited wealth. Does it not mean the division of any property whatsoever? Accordingly YÁJNAVALKYA has said, "One who is able to earn a livelihood, and claims not a share of the joint property, may be disunited from the family, on giving him some trifle as a consideration to prevent future strife;" and there can be no necessity of separate acts of religion without partition. *It bears not that meaning*: for it might be supposed that no separation could take place between those who have no property whatsoever. Consequently, the meaning of partition is separation in respect of food prepared for the entertainment of guests and relatives, and for other purposes which are common (among united co-heirs). How then can

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separation take place between those who are not visited by relatives or guests? *Distinct preparation of food, after an agreement in these words, "henceforward we are disunited," is partition.* Afterwards their acts of religion, and wealth or the like, received on some consideration relative to the father, are separate; before that agreement they are single.—*Coleb.* Dig., Vol. III, pp. 420, 421.

517. Where a co-heir through confidence in his own ability, declines to take his share of the ancestral or common estate, there his father, or co-heirs should separate him by giving him something though not valuable. *Vyavasthá.*

If one of the co-heirs through confidence in his own ability, decline his share of the wealth inherited from the father, grandfather or other ancestor, something should be given him, be it only a *prastha* (*h*) of rice on his separation, for the purpose of obviating any future cavil on the part of his son and other heir.* Thus— Authority.

MANU:—If any of the brethren has a competence from his own occupation, and desires not the property, he may be debarred from his share giving him some trifle in lieu of maintenance,*—Chap. IX, *v.* 207. Authority.

So also the *Dáya-tattwa.* See *Ibid.*, Chap. III, § 15.

(*h*) '*Prastha.*' A measure of quantity, four *Kudavas* or forty-eight double handfuls. Explanation.

YÁJNAVALKYA:—The separation of one who is able (to support himself), and is not desirous (*anihamána*) of participation, may be completed by giving him some trifle. Authority.

The author of the *Prakásha* expounds the (above) text, 'giving some trifle of small value, to prevent future strife with his sons, disunion of religous ceremonies, or parti- Exposition.

Annotation.

517. Where a share is not desired by a son, it may be effectually waived by his acceptance of a trifle in satisfaction, upon the principle of '*quisque potest renunciare juri pro se introducto*;' his heirs being bound by his consent. But without renunciation, it may be still claimed.—Stra. H. L., (F. E.,) p. 124.

As on partition by a father, so among co-heirs, any one, not wanting his share, may waive it by acceptance of a trifle, such acceptance operating as an estoppel against his claim ever after.—*Ibid.*, pp. 183, 184.

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* *Dá. Bhá.*, Chap. III, Sect. ii, § 28.

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tion, may be made.' BHAVADEVA, the *Mitákshará* and the rest, furnish the same exposition. The term '*anthamána*, which is explained '*malevolent*' in the preceding comment, more properly signifies '*not wanting*,' the wealth of his father. How shall he find means of subsistence without partaking of the patrimony. Therefore does the legislator add, "who is able," that is, "able to earn a livelihood without *receiving a share of* the patrimony." The context suggests this sense. The sons of this co-heir might dispute the equity of the partition, if their father had been disunited from the family, with a trifle given to him; but according to this last opinion, in which the verb "*ih*" is taken in its sense of 'strive,' if future contests be prevented by his voluntary acceptance of an inferior share, it is also prevented by his voluntary renunciation of his own right. This is liable to objection, for a fine to the king is denounced against him, who voluntarily accepts an inferior share and *afterwards disputes the partition*,* and not against him who voluntarily renounces his share *and afterwards revives his claim.* The last opinion must be therefore admitted, taking the text in its literal sense (*that some trifle must be given by way of a share to prevent future strife*): and in the case of partition by a father, should he give no share to any one son—labouring under no legal disqualification, such as expulsion from his class or the like,—it must be remembered that such partition is expressly declared invalid. This text must be also adduced in the case of partition made after the death of the father, for no other text has been delivered by YÁJNAVALKYA; and the rule is propounded generally by MANU.†—*Coleb.* Dig., Vol. III, pp. 65—67

Vyavasthá. **518.** Partition is not always necessary by metes, bounds to render division of an estate and separation of the co-heirs of a joint family binding. If they, under an agreement, are separated in food, worship and the performance of other religious acts, and separately hold certain definite parts of the estate, and have separate dealings with, and liabilities against, each other, in the same manner

* Thus VRIHASPATI:—1. Whatever share is enjoyed by each, let not that be contested; if he subsequently dispute a distribution, which was made with his own consent,—2. He shall be compelled by the king to abide by his share, or be amerced if he persist in contention.—*Coleb.* Dig., Vol. III, page 399.

† In the text above cited

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as with strangers, then they become separated and their estate partitioned, though the latter has not actually been severed by metes and bounds or the like.

Vide Precedents, in page 704, and those in Chapter VI.

519. Partition of the ancestral or joint property should, however, be made after payment of the ancestral as well as joint debts, or after settlement for the liquidation thereof.* *Vyavasthá.*

520. Where any member of a joint family acquires a property by the use of the joint funds or with the corporal assistance of the other members, there the acquirer is entitled to two shares of the acquisition, and the rest, to one share each. *Vyavasthá.*

Vide Precedents, pages 687, 697, 698, 709—712, 714, 715, 716.

It is an uncontested rule that an acquirer, as such, shall have two shares of wealth gained by the use of joint funds, for that allotment has been ordained by a text.† Authority.

Annotations.

519. Previous, however, to partition, debts must be provided for, by such means as may be agreed at the time ; since, taking place in the life of the father, it must be looked upon as an anticipated descent of his property ; and, as the property of one deceased may be pursued by his creditors, into whatsoever hands it comes, it follows that the sons, among whom it is divided, must, at all events, be liable, to the extent of the shares assigned them ; under the general responsibility of the descendant and for the debt of his ancestor, subject to any arrangement for payment, to which the creditors have been parties.—Stra., H. L., Vol, I, (F. E.) pp. 119—120.

520, 521. Whether there has existed a use of the joint funds, or a common exertion of the co-heirs, in either of which cases the acquisition is partible, the acquirer takes a superior share. In all other instances, that of property recovered excepted, a share, *extra* the number that is to divide, is given to the special acquirer, beyond his equal share ; and, if more than one have been concerned

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* See *ante*, pp. 123—135. † *Dá. Bhá*, Chap. VI, Sect. i, § 28.

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Authority. VYÁSA :—The brethren *(c)* participate in that wealth which one of them gains by valour *(b)* or the like, using any common property *(a)* either a weapon or a vehicle: to him(*d*) two shares should be given, but the rest share alike.*

Interpretation *(a) The using of common property* must, however, be other than that of eating and clothing; inasmuch as a house-holder must use property for that purpose.—SRI-KRISHNA'S Commentary on the *Dáya-bhága, Sans.*, p. 124.

Interpretation *(b) Gains by valour.*] Acquired by means of the expenditure of the joint-stock; for it will be hereafter declared that wealth acquired without the expenditure of the joint-stock is indivisible.—*Dá. Kra. Sang.*, Chap. IV, Sect. i, § 12.

Interpretation *(c)* The term "*brethren*"—is merely illustrative, it comprehends also paternal uncles and the rest.—*Dá. Ta. Sans.*, p. 17.

Exposition. *(d) 'To him'*—that is, to the acquirer; and this is reasonable, for the acquisition is made on the part of the acquirer both by the use of the common property and by personal labour; but on the part of the rest simply by means of the joint stock.—*Dá. Kra. Sang*, Chap. IV, Sect. i, § 4.

Vyavasthá. **521.** Where several co-parceners contribute means and labour *unequally* in the acquisition of

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Annotations.

with him, they participate in the excess.—Stra., H. L., Vol. I, (F. E) pp. 195 and 196.

Claims to extra shares may of course be adjusted, with consent of parties, being sometimes treated as discretionary in amount. But the specific measures are as have been stated. This effect of the use of the joint stock, in rendering separate acquisitions, in general, common, is attended sometimes with injustice, where, in cases of small patrimony, large fortunes are made by the unaided exertions of enterprising parceners; of which the benefit may eventually be shared by drones, who have in no degree conduced to their accumulation.—Stra., H. L., Vol. I, (F. E.), p. 196.

Nor, to obviate this, is there any resource, where timely separation has been omitted; a right to the benefit of each other's labours being incident, where co-partnership has continued, and the joint property been instrumental. But, where the latter has not been the case, the claim to participate fails, though made by an unseparated member.—Stra., H. L., Vol. I, (F. E.,) pp. 196, 197.

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* *Dá. Bhá.*, Chap. VI, Sect. i, § 14.

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a property, there they are entitled to share in proportion to their respective contributions or aid.

Vide Precedents, pages 709, 710, 711, 715, 716.

YÁJNAVALKYA :—Shares should be assigned to each person in proportion to the amount of his allotment, be it little or much, which has been used.—See Macn., H. L., Vol. II, page 154. Authority.

522. Where a property is acquired by the use of joint funds, with the labour or exertion of one or more co-heirs, there the individual or individuals, whose money and labour both were used, shall have two shares each, while the rest who merely contributed money shall have one share each. *Vyavasthá.*

Vide Precedents, pages 709—711, 715, 716.

Where the exertion of one is merely through the joint property, and the other contributes to the acquisition by his person and wealth, it is a rule suggested by reason that the one shall have a single share and the other two. Hence likewise it follows, that if the joint stock should be used, shares should be assigned to each person in proportion to the amount of his allotment, be it little or much, which has been used.—*Dá. Bhá.*, Chap. VI, Sect. i, § 23. Authority.

Annotations.

522. If any of the co-heirs, living in union, acquire any property by the use of the common estate, employing himself in agriculture, &c.,* he shall have a double share, and the others, a share each.—*Vi. Chi.*, p. 255.

522, 523. It has also been ruled, that if lands are acquired partly by the labour of one brother, and partly by the capital of another, each is entitled to half a share ; and if they were acquired by the joint labour and capital of one, and by the labour only of the other, two-thirds should belong to the former, and one-third to the latter ; but this provision seems rather to be founded on a principle of equity than on any specific rule of Hindú Law.†—Macn., H. L., Vol. I, pages 52 and 53.

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* Here the translation of the (Sanskrit) word '*ádi*' (which means "*et, cetera*") having been omitted, is supplied by the author.

† Case of Koosul Chukravatee, *v.* Radha-nath. S. D. A. Reports, Vol. I, page 336. See Precedents, pp. 297—299.

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Authority. VRIHASPATI says:—A decision must not be made solely by having recourse to the letter of written codes; since, if no decision were made according to the reason of the law, there might be a failure of justice.—*Coleb.* Dig., Vol. II, p. 128.

Vyavasthá. **523.** Where, however, a property is acquired by the use of one parcener's money and another parcener's labour, there they both share it equally; equal shares are also ordained where the extent of the means supplied and exertions made by the co-parceners in the acquisition of a property is not, and cannot be, known.

Vide Precedents, pages 709—711.

Authority. Under the principle that "equality must be the rule where there is nothing laid down to the contrary."—*Vide Coleb.* Dig., Vol. III, p. 61.

Authority. VRIHASPATI:—All the brethren shall be equal sharers of that which has been acquired by them in concert.—Cited in the *Ratnákara* and *Mitákshará.*—See *Mit.*, Chap. I, Sect. iv, para. 15.

Vyavasthá. **524.** If any member of a joint family recover a paternal or ancestral property (excepting land), with the aid of the joint family, or without the acquiescence or privity of the members thereof, then he is entitled to two shares of such acquisition, and the other members, to one each.

Vide Precedents, pages 668—672, 697, 698, 703, 711, 712 and 716.

Vyavasthá. **525.** In the matter of land, however, a different rule prevails, *viz.*, whether it be acquired with or without the aid or acquiescence of the joint family,

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Annotations.

522—526. Any improvement to joint property effected by one of the brethren, does not confer on him a title to a greater share; but an acquisition made by one, by means of his own unassisted and exclusive labour, entitles the acquirer, according to the law as current in Bengal, to a double share on partition. And it was ruled by the Sudder Dewany Adawlut, that where an estate is acquired by one of four brothers living together, either with aid from joint funds, or with personal aid from the brothers, two-fifths

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one-fourth thereof is to be given to the acquirer as his remuneration, and the remainder to be divided among all the co-heirs, including the acquirer, in proportion to their respective rights.*

Vide Precedents, pages 668—872, 703, 716.

Authority.

SHANKA:—Land (inherited) in regular succession, but which had been formerly lost, and which a single (heir) shall recover by his own labours, the rest may divide according to their due allotments, having (first) given him a fourth part.*

Interpretation

The meaning of this text is, whoever, among the sons and grandsons, shall recover by his own exertions lands descended in regular succession, and which had been formerly lost, that is, seized by others, one-fourth share of such property is to be given to him, and the rest is to be divided by the other brothers in company with the recoverer.—*Vide Smri. Chan.*, Chap. VII, Cls. 33 and 34.

Vyavasthá.

526. Should a member of a joint family (be he, or not, the manager of its estate) augment or improve the joint estate by his sole exertions, he is not, therefore, entitled to a double or greater share of the augmentation.

Vide Precedents pages 673—676, 698, 702, 712.

Authority.

YÁJNAVALKYA—propounds an exception to that maxim: "But, if the common stock be improved, an equal division is ordained."

Exposition.

Among unseparated brethren, if the common stock be improved or augmented by any one of them, through agriculture, commerce, or similar means, an equal distribution, nevertheless, takes place; and a double share is not allotted to the acquirer.—Mit. Inh., Chap. I, Sect. iv, paras. 30 and 31.

Annotations.

should be given to the acquirer, and one-fifth to each of the other three. The rule is the same with respect to property recovered, excepting land, of which the party recovering it is entitled to a fourth more than the rest of his brethren.—Macn., H. L., Vol. I, pp. 51 and 52.

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* See *ante*, page 451.

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Vyavasthá. **527.** If any member of a joint family acquire a property by science, art, valour or the like, with the aid of the funds of the joint family, then the acquirer is to have two shares of the acquisition, and the other members of the family, one share each.

Vide Precedents, pages 677, 697 and 698.

Vyavasthá. **528.** But if he acquired a property by science, art, valour or the like, without such aid, still such property would be divisible in the above proportions in the case of such science, art or the like, being learnt from a member of the joint family.*

Authority. Even in such acquisition by learning as is partible, the acquirer is entitled to a greater share; VASHISHTHA having declared,—"He among them, who has made an acquisition, may take a double portion of it."—*Vide Smri. Chan.*, Chap. VII, Clause 9.

Authority. Here also, in all these cases, indivisibility applies only when no detriment has fallen on the paternal estate, in acquiring, as well superior knowledge as wealth; for, in case of detriment (to the estate), the acquisition is even divisible. Even so, KÁTYÁYANA says:—"Yet VRIHASPATI has ordained, that wealth shall be partible, if it was gained by learned brothers, who were instructed in the family by their father, or paternal grandfather, (or uncles); and it is the same, if the wealth were acquired by valour (with assistance from the family estate)." Also in case of loss to the paternal estate even, the acquirer gets a double share, from this text of VASHISHTHA: "He amongst them, who has made an acquisition, may take a double portion of it."—See *Vyav. Mayú.*, Chap. IV, Sect. vii, § 7 & 8.

Vyavasthá. **529.** It is settled that, whatever is acquired at the charge of the family funds or with the aid of a co-heir or co-heirs, is subject to partition; but the acquirer shall, in such a case, have a double share.

Vide Precedents, pages 676, 687, 697, 698, 712 and 715.

The rule that—'the acquirer shall have twice as much as the rest'—must be grounded on the reasoning.—*Dá. Bhá.*, Chap. VI, Sect. i, § 29.

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* See *ante*, pages 445—448.

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530. For the acquirer not to have the whole, but only two shares of his acquisition, and to render his co-parcener entitled to one share of the acquisition, the aid given by the latter must be, not insignificant, but valuable, and directly instrumental. *Vyavasthá.*

Vide Precedents, pages 684—689, 697 and 714.

531. Shares should be equal where no proportion thereof is specified.

Vide Precedents, pages 709, 714, 716.

Annotations.

530. If the family property have been instrumental to it, it vests in the family. Whether it has been so, to the effect of rendering joint that acquisition, which was, in fact, the product of an individual, may be sometimes a question of nicety, suited to the subtle disquisition of Hindú lawyers. Assuming, as a Hindú principle, that *de minimis non curat lex*, (it being said, on another occasion, that "things of ordinary value may be given up, for they are mere chaff,") in the instances adduced, of a co-parcener, in the practice of separate agriculture, taking a rope for his plough out of the common stock, or of one begging alms, in a pair of shoes that had belonged to it, it might be disputed, whether such contributions could invalidate his pretensions to an exclusive right in property so acquired. The question, in these cases, must be one of discretion. It seems agreed, that maintenance in the family, during the period of the separate acquisition, though it contribute to the end, is not alone sufficient to affect it with a joint character, the expenditure for the purpose being incidental. As well (says an author) might it be said that it should be common, inasmuch as the acquirer "sucked his mother's milk". So, though there should have been ever so considerable a disbursement from the family property, on his initiation, or marriage, neither will this subject his individual gains to be participated; because every thing of the kind is collateral to them, and not with the view in question; whereas, to take the case out of the rule, where there has been no conjoint labor, the common funds must have been directly instrumental. The rule applies to all the various modes, by which property is acquirable, service, science, military achievements, with gifts or presents; as also to whatever may have been recovered, by an unseparated member, of family property, which in the time of the ancestor had been lost.—Stra. H. L., Vol. I, (F. E.) pp. 189—191.

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Authority. Under the principle that equality must be the rule where there is nothing laid down to the contrary.—*Coleb.* Dig., Vol. III, p. 61.

Vyavasthá. **532.** In the present age, the shares of the brothers of the same description are *equal* and *per capita.* See Partition by brothers.

Authority. HÁRÍTA ordains an equal distribution without deductions, in the following passage, after speaking of a father:—"If he be dead, the partition of inheritance should be made equally." So USHANAS says: "The distribution among brothers born of women of the same tribe is ordained to be made equally." So also POITHÍNASI says: "When the paternal inheritance is to be divided, the shares shall be equal." YÁJNAVALKYA too declares: "Let the sons divide equally the effects and the debts, after the death of both parents."—See *Dá. Bhá.*, Chap. III, Sect. ii, § 25.

Vyavasthá. **533.** In a partition made between a legitimately begotten son (*ourasa*) and an adopted son (*dattaka*), the former has two shares, and the latter (who must be of the same class with his father) takes one share.—*Dá. Kra. Sang.*, Chap. VII, § 23.

Vyavasthá. **534.** The shares of the fatherless grandsons and the great-grandsons whose fathers and grandfathers are both dead, are to be apportioned *per stirpes*, that is, of the former, with reference to

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Annotations.

532,—534. The son is next heir of his father; and if there be any number of sons, whether by one wife, or by different wives, they will succeed as joint heirs to an undivided estate, without reference to their mothers, or the number of them which may have been born of each mother—they will take equally *per capita.* The children of these sons will take *per stirpes.* Thus, if, A shall leave three sons B, C and D,—B by one wife, and C and D by another,—B, C and D will enjoy the estate of A equally between them. But if B shall die leaving two sons E and F,—if C shall die leaving three sons G, H and I,—and if D shall die leaving four sons K, L, M and N, then E and F shall be entitled to one-third,—G, H and I shall be entitled to one-third, and K, L, M and N shall be entitled to one-third of A's estate;—and they will so inherit jointly, or so take upon partition, even if B, C and D, had all died in the life-

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their respective fathers, and of the latter, first with reference to their grandfathers and then to their own fathers; but those of the other heirs are equal and *per capita*.

Vide Precedents pages 705, 720, 736, 741, 742, 746.

Authority.

KÁTYÁYANA :—"Should a son die before partition, his son shall be made a partaker of the estate, provided he has not received from his grandfather property sufficient for his support. He shall receive his father's share from his uncle or his (uncle's) son; and the same proportionate share shall be, according to law, allotted to all the brothers; (or if that grandson be also dead) let his son take the share; beyond him (lineal succession) stops."*—*Dá. Ta.* (Sans.) pp. 11 & 51.

If there be many sons of the deceased (son), their father's share only (and no more) should be subdivided and allotted amongst them. In like manner, on the extinction of right of the (late) owner's grandson, his (the latter's) share only shall be taken by his sons (the great-grandsons of the late owner).*—*Ibid.*

Illustration.

To grandsons, of whom the fathers are different, shall be allotted portions in right of their several fathers: all the grandsons succeed to the proper shares of their respective fathers. Consequently so many shares should be formed as there are sons of the original proprietor, and should be given to their respective sons; and let them take these shares, whether they be uterine brothers or born of different mothers, and whether they live together, or subdivide the shares according to the number of their own brothers respectively: such is the meaning of the text. This rule of adjustment is grounded on positive texts.—*Coleb.* Dig., Vol. III, pp. 6 and 7.

Annotations.

time of A;—B, C and D, had they survived A, would have taken *per capita*; but their sons, or more remote descendants, will take *per stirpes*; and if in the life-time of A, B had died leaving grandsons, C had died leaving sons, and had D survived A, then D would have taken one-third, the sons of C would have taken one-third, and the grandsons of B would have taken one-third of A's estate.—Cons. H. L., p. 5, § 12.

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* See *ante*, pages 21.

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Vyavasthá. **535.** The proportion of the share of a *Shúdra's* illegitimate son should be regulated as already directed. See *ante*, pages 23—28.

Vyavasthá. **536.** The portion to be allotted to a man's wife upon the partition made during his life-time of his self-acquired property is equal to a son's share; the same, however, is to be made up with her *strí-dhana* if any such may have been given by him or his family.

Vide Precedents pages 737—739.

Vyavasthá. **537.** The share to be allotted to a mother in the partition of her husband's property between her sons, or a son and the heir of another son, is also equal to a son's share to be made up as above; and that of a grandmother to be allotted on the partition of her husband's estate between her grandsons or a grandson, and the heir of another grandson, since deceased, is a grandson's share to be also made up as above. See Sections iv & v, of Chapter V.

Vide Precedents, pages 737—739.

Remark. This is, where shares are allotted to them by way of maintenance. But,—

Vyavasthá. **538.** Where a widow, mother or grandmother, inherits as an heiress, there she is to take the whole of the inheritance devolving on her.*

Vyavasthá. **539.** At the time of partition, if a widow of a deceased brother or co-heir is known to be pregnant or is supposed to be so, then the share, which the fœtus, if born as a son alive, would be entitled to, should be given to the widow for the behoof of

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Annotations.

539. If a widow of a deceased co-heir happen to be pregnant at the time of his death, or supposed to be so, either partition should await, or a share should be set aside, to abide the con-

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* See *ante*, pages 29, 76 and 97.

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the son likely to be born of her, but if no son is born the same is to be given to the then next heir of the deceased.

VASHISHTHA :—A share of the heritage with the brothers shall be allotted to the widows who have no offspring, but are supposed pregnant, *to be held by them* until they severally bear sons (*a*).—*Coleb.* Dig., Vol. III, p. 86. Authority.

(a) Widows here signify wives of deceased brothers. If they be supposed likely to bear sons, a share must be also allotted to them, but if no son be produced, that share belongs to the brothers;* and the widows must be maintained by them. Consequently, shares are only allotted to widows for the behoof of their sons.—*Ibid.*, p. 86. Exposition.

It should be here noticed that a share must also be allotted, from parity of reasoning, to a step-mother who is supposed likely to bear a son: and such is the consistent purport of the text, as explained by JÍMÚTA-VÁHANA and the rest.—*Ibid.*, p. 87. Exposition.

540. At the time of partition, if there be a minor among the persons entitled to shares, or one absent abroad, then the share of the minor *Vyavasthá.*

Annotations.

tingency of having an after-born son; failing which it reverts, and is distributable, subject to the maintenance of the widow†.—Stra. H. L., Vol. I, (F. E.,) p. 183.

540. Upon the same footing in this respect, with minors, are *absentees*, residing in a foreign country; whose consent, at the time, not being attainable, partition may proceed without it, the law enjoining the preservation of their respective shares, till one arrives at majority, and the other returns; and this, in the case of the latter, to the extent of the *seventh* in descent, the right

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* "If no son be produced, that share belongs to the brothers."—This much, as respects the law of Bengal, appears to be wrong, inasmuch as according to the law of this country, in the case of no son being produced, that share would revert and belong to the widow, who, in default of a son, inherits from her husband.

† "Failing which, it reverts, and is distributable, subject to the maintenance of the widow." This much seems to be in accordance with the law of the other schools and not with that of the Bengal school, according to which the share so set apart would devolve on the widow herself who would take it as heir to her sonless husband.

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or absentee must be deposited with his kinsmen and friends.*

Authority. KÁTYÁAYANA :—Let them deposit free from disbursement, in the hands of kinsmen (*b*) and friends, the wealth of such as have not attained majority, as well as of those who are absent.*

Authority. So also VISHNU :—The property of minors should be preserved until they attain their full age.*

Authority. KÁTYAYANA :—Let all the co-heirs guard the share which belongs to an absent parcener; but if a man die leaving an infant son, his wealth must be preserved entire by his kinsmen (*b*), like the allotment for an absent parcener; and they may divide it in due proportions after the minor has passed adolescence.—*Coleb.* Dig., Vol. III, p. 544.

In expounding the above text, JAGAN-NÁTHA says,—"The share of a minor must be preserved during his adolescence; for the reason of the law is the same: but before his adolescence partition is not proper. In like manner the king, or the kinsmen (*b*), appointed by him, should guard the minor's property received from his brothers as his share of the inheritance.—*Ibid.*

Further exposition. (*b*) Here 'kinsmen' signify relations in the male line, or, on failure of them, a sister's or daughter's son or other near kinsmen (of the father). In practice, the mother is the guardian of a minor, and of his property: and that is proper, if she be capable (of protecting the ward).—*Ibid.*, page 545.

Annotations.

of parceners, remaining at home, being lost by dispossession beyond the *fourth*.—Stra. H. L., (F. E.,) Vol. I, pp. 182, 183.

A minor's share should be secured for him.—*Ibid.*, p. 117.

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* *Dá. Bhá.*, Chap. III, Sect. i, § 17. See *Vyav. Chan.*, Vol. II, part i, page 338.

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CHAPTER IV.

ON PARTITION BY, OR IN THE LIFE-TIME OF, A FATHER.

SECTION I.

PARTITION BY A FATHER OF HIS SELF-ACQUIRED PROPERTY.

VISHNU :—"When a father separates his son (from himself,) his will regulates the division of his own acquired wealth."*

The meaning of this passage is as follows :—

541. In the case of his own acquired property, whatever he may choose to reserve, whether half or two shares, or three, all that is permitted to him by the law: but not so, in the case of the property ancestral.* *Vyavasthá.*

Vide Precedents, pages 725—735, 747.

HÁRÍTA :—A father, during his life distributing his property, may retire to the forest, or enter into the order suitable to an aged man (*a*); or he may remain at home, having distributed small allotments, and keeping a greater portion: should he become indigent (*b*,) he may take back from them.*(1) Authority.

Annotations.

(1). Supposing the property to have devolved on the father, by right of inheritance, and the father to have reserved his proper share, (that is the double share of a son's,) and to have divided the remainder among his sons, the father is not entitled to claim the property so divided; and if the father, without reserving his share, or reserving a small portion, have divided his patrimony among his sons, he is competent to have his share from his sons, even though the division was made by him voluntarily. If the property was self-acquired, and he distributed it among his sons, with or without reserving a portion, and subsequently the share reserved be expended or lost, in this case the father is competent to take back the property from his sons comformably to a text of HÁRÍTA cited in the *Dáya-bhága.*—Note by Sir William Macnaghten. See his Work on Hindú Law, Vol. II, p. 114.

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* *Dá. Bhá.*, Chap. II, § 55, 56, 57, 58;—*Dá. Kra. Sang.*, Chap. VI, paras. 1, 2, 7, 8.

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By this text the father is authorized to distribute a small part, and to reserve the greatest portion of his wealth.—*Dá. Bhá.*, Chap. II, § 58.

Explanation. (*a*) "*The order suitable to an aged man*"—intends retirement.—*Dá. Bhá.*, Chap. II, § 58.

Explanation. (*b*) "*Should he become indigent:* Meaning should he have spent the whole of his wealth.—*Dá. Kra. Sang.*, Chap. VI, para. 10.

Vyavasthá. **542.** The shares of the residue of his self-acquired property which the father should give to his sons should be equal (except for any of the reasons to be presently mentioned.)

Authority. BOUDHÁYANA:—The shares of all are equal, it being without distinction laid down in the *Sruti:* 'MANU distributed his heritage among his sons.'—*Vide Smri. Chan.*, Chap. II, Sect. i, Cls. 5 & 6.

Remark. As for the eldest son, the same author (BOUDHÁYANA), observing that another *Sruti* sanctions a greater share being allowed to him, says, "*Let the eldest take one most excellent chattel* (*dhana*)*;* it being declared in *Sruti*:—'It is necessary to gratify the eldest son with wealth (*dhana.*)'"—*Vide Ibid.*, Cl. 8.

Remark. Although a father may divide his own-acquired property in equal shares after giving to the eldest son one chattel, the best of all, or without giving it, and although, in the present (*kali*) age, eldest sons endued with such learning, virtue, and qualities as would entitle them to double shares or deductions (which will be shown in the following chapter,) are rare, yet, they seem to deserve at least such remuneration or distinction as the above at the hands of their fathers for conferring on them great benefits from the moment of their birth.

Authority. "By the eldest," says MANU, "at the moment of his birth, the father, having begotten a son, discharges his debt to his own progenitors; the eldest son, therefore, ought, *before partition*, to manage the whole patrimony. *That* son alone, by whose birth he discharges his debt, and through whom he attains immortality, was begotten from a sense of duty: all the rest are considered by the wise as begotton from love of pleasure. The first-born, *if virtuous*, exalts the family, or, *if vicious*, destroys it: the first-born is in this world the most respectable; and the good never treat him with disdain."—Chap. IX, *vs.* 106, 107 & 109.

Authority. In like manner SANKHA and LIKHITA declare:—"A father is exonerated in his life-time from the debt to his

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own ancestors upon seeing the countenance of a living son: he becomes entitled to heaven by the birth of his son, and throws on him his own debt. The sacrificial hearth, the three *Vedas*, and sacrifice rewarded with ample gratuities, have not the sixteenth part of the efficacy of the birth of an eldest son."—See *ante*, page 16, note.

As respects the deduction of a twentieth part and so forth (to be hereafter shown), the bestowal thereof has been abrogated or is obsolete in the present (*kali*) age. See the following Chapter. Remark.

543. The first-born male child by a wife, be she herself the eldest wife of her husband or not, is the eldest son of his father. *Vyavasthá.*

Vide Precedents, page 707.

MANU:—Between sons born of wives equal in class, *and* without *any other* distinction, there can be no seniority in right of the mother; but the seniority, ordained by law, is according to birth.—See *Vi. Chi.*, p. 233. Authority.

544. Between twins, the son born first is held to be the elder, or the eldest (as the case may be). *Vyavasthá.*

Between twins, the birth-right of that one first born is thus declared by MANU:—"The right of invoking INDRA by the texts, called *Swabráhmanya*, depends on actual priority of birth; and of twins also, [if any such be conceived] among [different] wives, the eldest is he who was first actually born." Among twins, to him whose face [kinsmen] first see after his birth, belong [the privileges of] male offspring, [the right of performing obsequies] for his father, and [the honours of] primogeniture.—See *Vyav. Mayú.*, Chap. IV, Sect. iv, § 9.

As regards even his self-acquired property, the unequal distribution by his own will should be guided by such reason as the existence or absence of filial piety, of large family, of inability and the like (of any son).—*Dá Ta.*, Chap. II, § 4. So,— Remark.

545. A father can make an unequal distribution of his own acquired property, being desirous of giving more to one son as a token of esteem on account of his good qualities, for his support on account of a numerous family, or through compassion by reason of his incapacity, or through *Vyavasthá.*

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favor by reason of his piety: the father so doing acts lawfully.*

Vide Precedents, pages 725—737.

Authority. But if he make an unequal distribution of his own acquired wealth, being desirous of giving more to one, as a token of esteem, on account of his good qualities, for his support on account of his numerous family, or compassion by reason of his incapacity, or through favor by reason of his piety, the father so doing, acts lawfully.—*Dá. Bhá.*, Chap. II, § 74.

Authority. YÁJNAVALKYA declares it:—"A lawful distribution, made by the father, among sons separated with greater or less allotments, is pronounced (valid)."*

Authority. So VRIHASPATI:—"Shares, which have been assigned by a father to his sons, whether equal, greater, or less, should be maintained by them. Else they ought to be chastised."*

Authority. NÁRADA likewise:—"For such as have been separated by their father with equal, greater, or less allotments of wealth, that is a lawful distribution: for the father is lord (*c*) of all*"

Explanation. (*c*) "*Lord*"—That is, possessed of the power to alienate at pleasure.—*Dá. Kra. Sang.*, Chap. VI, § 13.

Exposition. Since the circumstance of the father being lord of all the wealth, is stated as a reason, and that cannot be in regard to the grandfather's estate, an unequal distribution made by the father is lawful only in the instance of his own acquired wealth.*

Authority. KÁTYÁYANA says,—"But let not a father distinguish one son at a partition made in his life-time, nor on any account exclude one from participation without a cause." (*d*)*

Authority. "Let him not distinguish one by the allotment of a greater portion, nor exclude one from participation by depriving him of his share, without sufficient cause." (This does not relate to the specific deductions:) for the distinguishing of sons by allotting to them the prescribed deductions extends to many, and is not confined to one. One son should not be distinguished without cause. But

* See *Dá. Bhá.*, Chap. II, § 75, 76, 84;—*Dá. T. Sans.*, p. 8;—*Dá. Kra.*, Chap. VI, § 12.—*Coleb.* Dig. Vol. II, pp. 543, 547, 548.

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for a sufficient reason, it may be done. Since the meaning is "even one son." The distinguishing of one has no reference to specific deduction, but intends a distribution made according to the father's mere pleasure (*e*), as before explained.—*Dá. Bhá.*, Chap. II, § 85.

(d) '*Without a cause*'—Such as piety, a large family to maintain, or inability (to earn his livelihood,) and the like, (as explained on the concurrent opinions of JÍMÚTA-VÁHANA and the rest.)—He shall not prefer one son, or distinguish him by assigning to him a larger portion, nor shall he exclude one of his sons from a share, or disinherit him without a legal cause of exclusion, such as degradation and the like, or spontaneous relinquishment of his share.—*Colcb.* Dig., Vol. II, p. 540.—SRI-KRISHNA concurs in this exposition. See his Commentary on the *Dáya-bhága, Sans.*, p. 70. Exposition.

(*e*) By the term 'mere pleasure' is meant that he can divide his self-acquired property at his pleasure, for any of the above reasons.—SRI-KRISHNA's Commentary on the *Dáya-bhága, Sans.*, page 70. Consequently,— Explanation.

546. Unequal partition is lawful, when grounded on (either of the four) reasons (*f*) above-mentioned.—*Dá. Bhá.*, Chap. II, § 83. *Vyavasthá.*

(f) '*Grounded on reasons*'—that is, on the ground of piety, having a large family to maintain, and so forth.—SRI-KRISHNA'S Commentary on the *Dáya-bhága, Sans.*, p. 69. Explanation.

547. Should the father make an unequal distribution among his sons, without any of the aforesaid reasons, such division is not moral, this is the meaning.—SRÍ-KRISHNA'S Commentary on the *Dáya-bhága, Sans.*, p. 65. But,— *Vyavasthá.*

Vide Precedents, pages 717, 718, 725—735.

Annotations.

541. Sir William Macnaghten writes:—"According to the law of Bengal, the father may make an unequal distribution of property acquired by himself exclusively as well as of movable ancestral property and of property of whatever description, recovered by himself retaining in his own hands as much as he may think fit; and should the distribution he makes be unequal, or should he, without a just cause, exclude any one of his sons, the act is valid though sinful."

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Vyavasthá. **548.** If the father give a greater portion to one son, and give less or none to another son, through perturbation of mind occasioned by acute disease, wrath, &c., or through the influence of excessive partiality on his mind from love or the like, such distribution is invalid.*

Authority. A father, must not however, while afflicted by sickness or disorder, or labouring under distraction of mind or inflamed with anger, or influenced by partiality for the son of a favourite wife, distribute a less or greater share to one of his sons, without the existence of any of the causes above-mentioned: for*

Authority. The text of NÁRADA declares:—"A father who is afflicted with disease, or influenced by wrath, or whose mind is engrossed by a beloved object (*g*), or who acts otherwise than the law permits has *no power* in the distribution of the estate."*

Authority. The text of NÁRADA (above cited) relates to the case where the father through perturbation of mind occasioned by disease or the like, or through irritation against any one of his sons, or through partiality for the child of a favourite wife, makes a distribution not conformable to law.—*Dhá. Bhá.*, Chap. II, § 83.

(*g*) '*Engrossed by a beloved object:*'—such as, excessively partial towards the son of the favourite wife.—*Dá. Kra. Sang.*, Chap. VI, § 15.

Should the father give his whole fortune, or nearly the whole, to one son, through partiality, and give nothing to another, or a trifle only, through resentment, such a distribution may be resisted. The text of VRIHASPATI and others (p. 484), cannot deny the right of opposition: for it is declared in the text above cited that "the father has *no power* (in such circumstances) to make a partition different from the law (of inheritance.)"—*Coleb.* Dig., Vol. II, p. 548.

Consequently, the sense is this; as the worship of deities, performed during impurity, is productive of no merit, so does the volition of one insane, wrathful, or the like, who intends to make a gift, produce no divesture of former

* *Dá. Kra. Sang.*, Chap. VI, § 14; *Dá. Bhá.*, Chap. II, pp. 84, 83.—*Coleb.* Dig., Vol. II, p. 540, 541.

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property; for, as a pure worshipper is alone qualified for the one act, so is a wrathless man or the like for the other. Consequently, since the distribution made by him is null, partition must be made afresh.—*Coleb.* Dig., Vol. II, p. 543.

The conclusion therefore is this:—

549. If the father give a greater portion to the sons who are dutiful and so forth, the partition is moral as well as valid;—if he give less to one and more to another, or disinherit any son, through peturbation of mind occasioned by disease, &c., such an act is not valid;—and if he, without any merit, such as dutifulness or the like, or without perturbation of mind, but only at his own pleasure, make an unequal distribution, it is also valid, though sinful. *Vyavasthá.*

Vide Precedents, pages 717, 725—735.

550. When sons unanimously request partition (in the father's life-time,) the father shall not make unequal distributions on account of (filial) piety, or the like.* *Vyavasthá.*

When sons request partition in the father's life-time, an unequal allotment should not be granted by him.*

MANU declares it:—"Among undivided brethren if there be an exertion in common, the father shall on no account make an unequal distribution in such case."*

If a man has five sons;—one dutiful, one unable to earn his livelihood, another burdened with a large family to be maintained, a fourth otherwise circumstanced. These four, but not the fifth, demand a partition. In this case unequal distribution on account of piety, duty, or the like, may be made; for there is no common exertion of all the brethren.—*Coleb.* Dig., Vol. II, p. 546.

SECTION II.

ON ALLOTMENT OF A SHARE TO THE WIFE DESTITUTE OF MALE ISSUE.

551. If the father give equal shares to his sons, he should also give such a share to such of his wife or wives as is or are destitute of male issue. *Vyavasthá.*

Vide Precedents, pages 737—739.

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* See *Dá. Bhá.*, Chap. II, § 86—*Coleb.* Dig., Vol. II, p. 544.—*Dá. Ta.*, Chap. II, § 6.

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Authority. When the father effects the distribution, he should allot to his sonless wife a share equal to that of a son.—*Dá. Ta.*, Ch. II, § 13. So says,—

Authority. VYÁSA:—Even the childless wives of the father are pronounced equal sharers.*

Authority. When the father makes a partition of his own acquired property, he should give a share equal to the share of a son to such of his wives as are destitute of sons.—*Dá. Kra.*, Sans., Chap. VII, § 22, p. 98.

Exposition. According to JÍMÚTA-VÁHANA, RAGHU-NANDANA, SRÍ-KRISHNA, TARKÁLANKÁRA, and the rest, when partition is made by a father, a share equal to that of a son must be given to the wife who has no son, not to her who has male issue; her son should be considered as alone entitled to share in the partition; this, they think, agrees with the common sense. But, when partition is made by sons, no share need be allotted to the step-mother who has no male issue; but food and raiment must be assigned, for the late owner of the property was bound to support her.†—*Coleb.* Dig., Vol. III, page 13.

Remark. Sir William Macnaghten says,—"According to JÍMÚTA-VÁHANA, RAGHU-NANDANA, SRÍ-KRISHNA, and other Bengal authors, when partition is made by a father, a share equal to that of a son must be given to the childless wife, not to her who has male issue;—that where he (the father) reserves a large portion for himself, his wives are not entitled to any specific share, but must be maintained by him; and that where unequal shares are given to sons, the average of the shares of the sons should be taken for the purpose of ascertaining the allotments of the wives."—(Vol. I, pp. 47 & 49.) But, no authority can be found for the latter part in any of the books of the Bengal School.

Vyavasthá. **552.** The donation of an equal share to a wife occurs where no *strí-dhana* or separate property was bestowed on her by her husband or his family.†

Vide Precedents, pages 737—739.

Authority. YÁJNAVALKA:—When the father makes an equal partition among his sons, the wives who have no issue must have equal shares (with them), if they have received no wealth either from their lord or from his father (*h*).†

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* *Dá. Bhá.*, Chap. III, Sec. ii, § 32.—*Dá. Kra.*, Chap. VII, § 22.—*Dá. Ta.*, Chap. II, § 13.

† *Dá. Bhá.*, Chap. III, Sect. ii, § 31.—*Coleb.* Dig., Vol. III, p. 11. *Dá. Kra.*, Chap. III, § 24.

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(a) "From their lord or from his father:" This is a mere instance comprehending his grandfather, mother and the rest. The meaning is this, when she has received from any person wealth which should *ultimately* have accrued to her husband, that shall be included in completing the allotment; but if she received it from her own father and other relative, or from a maternal uncle or other *collateral* kinsman of her lord, such wealth shall not be included in her allotment, because it was exclusive of his claims. Such is the method of interpretation consistently with common sense—*Coleb.* Dig., Vol. III, pp. 19, 20. Exposition.

Should it be objected that it (the above text) is contradictory to HÁRÍTA's text: "Partition does not take place between a wife and her lord": such is not the case, since, in the present instance, no partition between a wife and husband is spoken of, that it might be contradictory to the (said) text of HÁRÍTA, but at the time of partitioning with (his) sons, shares equal to their shares, are, like gifts through affection, given to them (*i. e.*, to the wives of the father.) And, for this reason, it is said (by YÁJNAVALKYA): "But if any separate property has been given, half (a share) should be allotted. Thus there is no harm."—*Vír. Mi. (Sans).*, page 174. Remark.

553. But if any *strí-dhan* has been given as above to a sonless wife, then only '*ardha*' or a part, which together with the *strí-dhan* would amount to a son's share, should be given to her.* *Vyavastha.*

Vide Precedents, pages 401; 402.

YÁJNAVALKYA:—To a woman, whose husband marries a second wife, let him give an equal sum as a compensation for the supersession [*ádhi-vedanika*(*b*)] provided no *strí-dhan* have been bestowed on her, but if any have been bestowed, let him allot '*ardha*.'(*c*) Authority.

(*b*) The property which is bestowed on his first wife, by a man desirous of marrying a second, is termed '*ádhi-vedanika*,' the object of such gift being to contract a second marriage. This should be equal to what is given to the second wife. See *ante* page 214.

(*c*) Here the word "*ardha*" contained in the above text of YÁJNAVALKYA should be understood to mean 'not an exact moiety,' but 'a part in general', which is one of the two significations of that word as given not only in the Sanskrit Dictionaries in Sanskrit, but also in the *Pánini*, the greatest and best of all the Sanskrit grammars now extant.* Interpretation.

* See *ante*, pages 199—201.

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Consequently the expositions (of the said text) which are given by MAHESHWARA* and JAGAN-NÁTHA,† and which agree, with those of the *Mitákshará* and other law books of the other Schools, must be said to be equitable as well as consistent with the reason of the law, and being so, ought to be followed in practice. See *ante*, pages 199—201 where this subject is treated of *in extenso*. But,—

Remark. Although the above text relate to giving compensation to a superseded wife, yet it has been considered by the lawyers to be applicable to the case of giving a share to one's wife, conformably with the maxim: "The sense of the law, as ascertained in one instance, is applicable in others also, provided there be no impediment."‡

Authority. "Although," says Chúdámani, the first and most respectable Commentator of the *Dáya-bhága*, "this property relate to the case of a superseded wife, yet it may be so assumed in the present case also; conformably with the maxim, that the sense of the law as ascertained in one instance, is applicable in others also, provided there be no impediment."—See *Dá. Bhá.*, Chap. III, Sect. ii, Annotation 31. See *ante*, page 200.

Authority. So says also SRÍ-KRISHNA, the other celebrated Commentator of the *Dáya-bhága*. "Although this (property) relate to the gift made to a superseded wife, and the text 'to whom no *strí-dhan* has been given' relate to the partition made by a father, yet it may be so assumed in the present case also; conformably to the maxim, that 'the sense of the law as ascertained in one instance is applicable in others also, provided there be no impediment.'"—SRI-KRISHNA's Commentary on the *Dáya-bhága Sans.*, pp. 81 and 82. But,—

Vyavasthá. **554.** Where peculiar property (*Strí-dhan*) has been bestowed on some of the wives, the other wives, destitute of male issue, must be rendered by the father partakers of wealth to the same amount.—*Dá. Kra. Sang.*, Chap. VII, § 25.

But where such peculiar property has not been given there they must be rendered equal sharers with the sons. This is the law in the case when the sons are made equal sharers.—*Ibid.* § 26.

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* One of the Commentators of the *Dáya-bhága*.

† Author of the *Viváda-bhangárnava*, the translation of which is called "Colebrooke's Digest."

‡ See *Dá. Bhá.*, Chap. III, Sect. ii, Annotation 31.—*Coleb. Dig.*, Vol. III, pp. 18, 19. See also *ante*, page 200.

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In the case, however, of peculiar property having been given to (all the wives), they will only receive half a share by the rule of analogy, observed in case of a superseded wife, who has received peculiar property, and who is entitled to receive only half the gratuity (otherwise) given to a wife on her supersession.—*Ibid.* § 28. But see *ante*, pages 199—202.

If he (the father) allot an excellent portion to the eldest son and so forth, his wives shall not have such excellent shares, and the like; but, after setting apart the deducted allotments, they shall receive equal shares together with deduction, as ordained by APASTAMBA:*—"The pots of the house and the ornaments shall be allotted to the wife." Remark.

555. If the share allotted to a wife, mother, or grandmother, be consumed in her support, she is entitled to receive alimony from her husband or son, or grandson, for, at all events, she must be maintained.* *Vyavasthá.*

556. But if a surplus remain above the consumption, and the husband's wealth be wholly dissipated, he may, by parity of reasoning, resume property from his wife, as he might resume it from his son.* *Vyavasthá.*

557. Like a widow, the wife also cannot, without a just cause or legal necessity, alienate the property thus received by her, inasmuch as it was given for her maintenance, and not for any other purpose.† *Vyavasthá.*

Can the property received by a wife, mother, or grandmother, when partition is made, be disposed of by her like her *stri-dhan*, or must it be held, as received in right of affinity, and incapable of being alienated by her (without a legal cause)? To this, JAGAN-NÁTHA has made conflicting replies assenting to both. In one place he says: "The share allotted to a wife and the rest, like that which is given to a son, may be disposed of at their pleasure. Hence, like female property, the gift, sale, or other alienation of that share is valid: for it is equally given Remark.

* See *Coleb.* Dig., Vol. III, pp. 13, 19, 20 and 26.

† See the Sections treating of the allotments made to a mother and grandmother in the following Chapter.

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her by her husband and the rest*" In another place he asserts: "Nor should it be objected that, since the share of a wife is in a manner (gratuitously) given, it ought to be held similar to female property. Being received in right of the relation of a wife to her husband, it is justly considered as similar to connected property, or wealth devolving on heirs in right of affinity."† A few of the modern lawyers, concurring in the former opinion, have said that property obtained by a woman in partition is to be held as her *stri-dhan*, given by the husband and the rest, it being more in the nature of a gift, than what she succeeds to in her own right. But the rest of them have concurred in the latter exposition of JAGAN-NÁTHA, the same being grounded on the opinion of SRÍ-KRISHNA TARKÁLANKÁRA,‡ and more consistent with reason.

"Such being the case," "says JAGAN-NÁTHA," would her *daughter* succeed to such wealth on her death, if she leave no male issue, although a son born of another wife, (of her husband) be living? No; for the text 'after her, let the heirs take it,' may relate solely to property received by the wife in right of her connection (by marriage) as easily as it may relate to the property of the husband, in which the wife has an interest; since there is no argument, on which one meaning should be selected in preference to the other, and the right of the husband's heirs has been alone propounded. Again, the equal title of her own son, and of one born of another wife is admitted."§ The following therefore should be the rule of decision.

Vyavasthá. **558.** She will only enjoy the property (like a heritage,) with moderation until her death; after her, the heirs of the former owner will take it.

Vide Precedents, pages 741—747.

Remark. When a distribution is made by a father, if his own mother be living, no share is ordained for her; since the law has only ordained the allotment of a share to the mother, when partition is made by sons with each other. It should not be argued, that her participation may be deduced from the law which ordains the allotment of a share to a grandmother, in the case of partition among grandsons. This is not partition made by her grandsons, but by her son; it is, therefore, a distribution made by her own son.‖

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* *Coleb.* Dig., Vol. III, p. 27. † *Coleb.* Dig., Vol. III, p. 24.

‡ SRÍ-KRISHNA TARKÁLANKÁRA does not admit the validity of sale or other alienation by a wife and the rest.—*Coleb.* Dig., Vol. III, p. 23.

§ *Coleb* Dig., Vol. III, p. 23. ‖ *Coleb.* Dig., Vol. III, p. 31.

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SECTION III.

On Partition by a father of ancestral property.

For the reasons before stated, since the equal participation of father and son in the estate of the (paternal) grandfather or other ancestor would be incongruous, and since it cannot be intended by the text (*a*) to confer on sons a right to demand partition; that text must either be meant to prevent an unequal distribution depending solely on the father's pleasure; or it must intend the equal right of nephew whose father is deceased to share with his uncle [conformably with the other exposition (*a*)*]—*Dá. Bhá.*, Chap. II, § 32.

(*a*) The text and exposition above alluded to are in the subjoined passage:—

"The text of Yájnavalkya ('The ownership of father and son is the same in land which was acquired by his father, or in corrody, or in chattels,') properly signifies, as rightly explained by the learned Udyota, that when one of the brothers, whose father is living, and who have not received allotments, dies leaving a son; and the other survives; and the father afterwards deceases; the text declaratory of similar ownership, is intended to obviate the conclusion, that the surviving son alone obtains his estate, because next of kin. As the father has ownership in the grandfather's estate: so have his sons, if he be dead. There is not in that case any distinction founded on greater or less propinquity; for both *equally* confer a benefit by offering a funeral oblation of food, as enjoined at solemn obsequies. Such is the author's meaning."—*Dá. Bhá*, Chap. II, § 9.

Vishnu says:—If a father make a partition between himself and his son, he may give or reserve, at his pleasure, any part of his own acquired wealth, but over *landed* property left by a paternal grandfather, the father and the son have equal dominion (*b*).†

(*b*) Dominion over the father's estate during his life is not propounded by declaring the equal dominion of father and son over property inherited from the grandfather; for that inference has been already disproved. But the father alone has absolute property; and equal dominion is affirmed to show that no unequal distribution can be made in this case.‡

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* Sri-krishna.

† *Coleb.* Dig. Vol. II, p. 538.

‡ *Coleb.* Dig., Vol. III, pp. 36 & 43.

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The ownership being figuratively attributed to the son, though he be not the true owner, a right attendant on ownership is alone assumed: and that right consists, according to JÍMÚTA-VÁHANA in the power of claiming partition, and in that of resisting unequal division; for there is no ground for selecting one of these rights to the exclusion of the other. It does not consist in taking an equal share with the father; for that is not acknowledged by JÍMÚTA-VÁHANA.—*Coleb.* Dig., Vol. III, p. 43.

Vyavasthá. **559.** When the father makes a partition of ancestral property, he may take two shares for himself, and allot to each of his sons a single share.

Vide Precedents, pages 725—735.

Authority. If the father voluntarily makes a partition with his sons, he may reserve for himself a double share of property ancestral. For VRIHASPATI by saying, "the father may himself take two shares at a partition made in his lifetime;" and NÁRADA, "Let the father making a partition reserve two shares for himself;" do so ordain, without restriction.—*Dá. Bhá.*, Chap. II, § 35.

Authority. But when a father makes a partition of ancestral property, he may take two shares for himself and allot to each of his sons a single share for the text of VRIHASPATI, which declares: "The father may himself take two shares at a partition made in his life-time," relates to ancestral property.—*Dá. Kra. Sang.*, Chap. VI, § 16.

Authority. A father may reserve for himself two shares of wealth which has regularly descended in succession (from ancestors,) or of that which has been acquired by his son. He is not entitled to more, however desirous of it he may be. But of his own acquired wealth, he may reserve as much as he pleases.—*Dá. Bhá.*, Chap. II, § 73.

Remark. As for the text of VRIHASPATI: "In wealth acquired by the grandfather, whether it consists of movables or immovables, the equal participation of father and son is ordained:" its meaning is, that the participation shall be equal and uniform, and the father is not entitled to make a distribution of greater or less shares at his choice, as he may do in the instance of his own acquired goods. It does not imply that the shares must be alike.—*Dá. Bhá.*, Chap. II, § 50. Consequently,—

Vyavasthá. **560.** A father has not power to make an unequal distribution of ancestral property, consisting

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either of land, or a corrody, or slaves, even though (any of) the causes before mentioned, namely, superior qualifications, &c., exist.—*Dá. Kra. Sang.*, Chap. VI, § 18.

Vide Precedents, pages 725—735.

For the text of YÁJNAVALKYA, which declares—"The ownership of the father and son is the same in land which was acquired by the father's father, or in corrody, or in chattels," is intended to restrain the exercise of the father's will; for, it is impossible that as long as the father, the owner of the ancestral property, continues to survive, his sons should have ownership therein.—*Ibid.* Authority.

Consequently, immovable property inherited from the grandfather, and given or (unequally) divided through the indulgence of the father or through his favour, in consideration of filial piety, of a large family to maintain, or of inability to earn a livelihood, shall not be consumed nor enjoyed (as so distributed;) for this coincides with the text which declares the equal dominion of father and son.—*Coleb.* Dig., Vol. III, p. 41. Authority.

561. A father has ownership in gems, pearls and other movables, though inherited from the grandfather, and not recovered by him, just as in his own acquisitions, and has power to distribute them unequally,* provided the estate does not consist only of these.—See *ante*, page 465. *Vyavasthá.*

But the father possesses a power in regard to ancestral property other than land (and the descriptions above mentioned) such as pearls, gems, similar to that which he has in the disposal of his own acquired wealth. YÁJNAVALKYA declares: "The father is master of the gems, pearls and corals and of all (other movable property:) but neither the father nor the grandfather, is so, of the whole immovable estate.†—*Dá. Kra. Sang.*, Chap. IV, § 19. Authority.

(*a*) Here, by the specification in the first instance, of *gems, pearls and corals*, and afterwards by the use of the word '*all*' gold and other effects, exclusive of the three descriptions of property, consisting of land, &c., are intended. The word '*whole*', again, which occurs in the second portion of the above text, is made use of for the purpose of showing, that a prohibition does not exist against a gift of immovable property, not incompatible with the due support of the family. Thus it is stated in the *Dáya-bhága.*†—*Dá. Kra. Sang.*, Chap. VI § 20.

* See *Dá. Bhá.*, Chap. II, § 22. † See *Dá. Bhá.*, Chap. II, § 22. 23.

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Vyavasthá. **562.** But if the ancestral estate consist not of land, corrody, or slaves, but only of gems and other movable property, there the father has not power to make an unequal partition of the same, since the text which declares the father to be *master* applies where the estate consists of both movable and immovable property.—See *ante*, page 465.

Remark. But if a father give deduction of a twentieth part and so forth, to a virtuous or qualified eldest son and the rest, it is not an unequal distribution, inasmuch as it is not in the nature of an unequal partition, and the allotment of greater or less shares only is forbidden in partition, but not the deduction from entire estate before partition.

Remark. But as deductions were given to sons endowed with transcendent qualities, and such sons are rare in the present (*kali*) age, now the allotment of deductions has been abrogated or become obsolete, except where it is customary. See Partition by brothers.

Vyavasthá. **563.** As of the ancestral estate the father should give to his son his proper share, so should he give to his grandson whose father is dead, and to his great-grandson whose father and grandfather are dead, shares which their father and grandfather were respectively entitled to have. See *ante*, pages 476, 477 and 493.

Remark. "Should an unequal distribution of the property inherited from the grandfather be nevertheless made, a second partition cannot be requested, but the father is guilty of a moral offence; as is intimated by JÍMÚTA-VÁHANA in these words: 'unequal distribution made by the father is only lawful (morally considered,) in respect of property acquired by himself.' Consequently, since the father has full power over wealth which he himself acquired: his unequal distribution of it is lawful; but in respect of property inherited from the grandfather, that (unequal distribution morally considered) is unlawful. This appears to be his meaning."

Thus JAGAN-NÁTHA has expressed a new opinion on the plea or such being the meaning of JÍMÚTA-VÁHANA. This is not however right. For if such had been the meaning of that author, then, as in regard to sale and gift he has said: 'since it is denied, that a gift or sale should be made, the precept is infringed by

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making one; but the gift or transfer is not null,'* so also in respect of partition of ancestral real property, he would have declared a similar opinion. But neither he nor any of the leading authorities of the Bengal school has laid down that if the precept of the law is infringed in the distribution of ancestral real property, the partition shall not be invalid. It must therefore be understood to be their opinion that unequal distribution made by a father of property ancestral is immoral as well as invalid. Add to this, in Bhawání-charan Bánarjea, *versus* the heirs of Rám-kánta Bánarjea, which is the leading case on the subject, it has been established by a mass of authorities, and determined by the late Sudder Dewany Adawlut after an ample discussion, that unequal distribution of ancestral real property is illegal and invalid.

Remark.

That unequal partition or such distribution of ancestral estate is illegal and therefore invalid, has been intimated by the very translator of JAGAN-NATHA's book: I mean Mr. Henery Colebrooke, the Highest European authority on matters of Hindú law. He says,—"It appears to me an inconsistency, that a man may do that by gift or will which he may not do by a formal partition; and the Hindú legislators might have saved themselves the trouble of providing rules to regulate a father's distribution, if the whole may be evaded by the easy expedient of calling the distribution 'a gift', instead of 'a partition.'"—Colebrooke's opinion contained in his letter to Sir Thomas Strange under date the 22nd of July 1812. See Stra. H. L., Vol. II, (F. E.) pp. 425, 426.

SECTION IV.

ON A FATHER'S PARTICIPATION IN THE SON'S ACQUISITION.

In regard to this JÍMÚTAVÁHANA says:—"The father has a double share even of the property acquired by his own son. For, the expression is general: 'Let him reserve two shares;' or 'he may take two shares.' KÁTYÁYANA declares it very explicitly: 'A father takes either a double share, or a moiety of his son's acquisition of wealth.' Here the father has a moiety of the goods acquired by his son at the charge of his estate; the son, who made the acquisition, has two shares and the rest take one share each. But if the father's property have not been used, he has two shares; the acquirer as many; and the rest are excluded from participation. Or else, a father, endowed with

* *Dá. Bhá.*, Chap. II, § 30.

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knowledge and other excellencies, has a right to a moiety. A father destitute of such qualities has a double share in right merely of his paternity. Therefore, the meaning of the text is, that a father may reserve for himself two shares of wealth which has descended in succession (from ancestors,) or of that which has been acquired by his son.* He is not entitled to more, however desirous of it he may be.—*Dá. Bhá.*, Chap. II, § 65, 71, 73.

The explanation of the above as given by SRÍ-KRISHNA TARKÁLANKÁRA is as follows:—"This declaration of the father's participation of half or a double share in a son's acquisition on the ground of his being and not being endowed with excellent qualities must be known in the case of participation by many sons. But in the case of a single son, who is the acquirer, being participator, the father shall have the double share if endowed with excellent qualities, otherwise half. This is the equitable difference to be considered by the learned." Commentary on the *Dáya-bhága*. Sans. p. 65.

Remark. But a father endowed with knowledge and other excellencies, as required by law† not being found in the present (*kali*) age, now the principles applying to a father destitute of excellent qualities are alone in force. The following therefore is the decision.

Vyavasthá. **564.** Where there are several sons, there of the acquisition made by a son with the use of the father's stock, half is taken by him, two shares by the acquirer, and one share by each of his brothers;—while of the acquisition made without

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Annotations.

564. The sons have no property, and cannot seek independency while their father exists, as MANU says: "Three persons,—a wife, a son, and a slave, are declared by law to have *in general* no wealth exclusively their own: the wealth which they may earn is regularly acquired for the man to whom they belong."

Under these circumstances, the father is not only entitled to obtain maintenance from his sons, although the property be acquired by the sons, but he may take a share of it, whether the acquisition was made with or without the personal labour or

* As a son partakes of wealth acquired by his father, so the father is likewise entitled to partake of property acquired solely by his son. This is the only accurate exposition.—*Coleb.* Dig., Vol. III, p. 55.

† See *ante* page 397.

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the use of the father's funds, two shares go to him, and two to the acquirer, his brothers being excluded from participation.

Vide Precedents, pages 748, 749.

565. But in the case of there being an only son, the father takes half of his son's acquisition and the acquirer as much. *Vyavastha.*

JAGAN-NÁTHA cites the *whole* of the above text of KÁTYÁYANA, the translation whereof, as made in Colebrooke's Digest, runs thus:— "Out of property acquired by a son, the father, *if he be living shall, on a division of the family*, receive two shares *in some cases*, or half *in others*; and the mother, if the father be dead, shall take an equal share with her son;" and says, "What is the import of the first hemistich in this text propounded by KÁTYÁYANA? Does it relate to property acquired by the son, with or without the use of patrimony, or to property of another sort? On this JÍMÚTAVÁHANA: observes, 'Of wealth acquired by a son through the use of the patrimony, the father shall have half; the son, who acquired it, two shares; and the rest one share each: but, out of the property acquired by a son without the use of the patrimony, the father shall have two shares, the son, who acquired it, shall also have two shares, and the rest are not entitled to any participation.'—JÍMÚTAVÁHANA also proposes another mode of interpretation: 'a father, who is endued with good qualities, such as science, valour, or the Remark. Authority.

Annotations.

pecuniary aid of the father, as will appear from the following texts of the *Dáya-bhága*.

Thus the father has a double share even of wealth acquired by his own son. For the expression is general: Let him reserve two shares; or, he may take two shares. KÁTYÁYANA declares it very explicitly: "A father takes either a double share, or a moiety of his son's acquisition of wealth; and a mother also, if the father be deceased, is entitled to an equal portion with the son. The meaning of the passage is that the father has a right to take either a double share or a moiety of his son's acquired wealth.

The general rule is, that the father has a moiety of the goods acquired by his son, at the charge of his estate; the son who made the acquisition has two shares, and the rest take one a piece. But if the father's estate have not been used, he has two shares; the acquirer, as many, and the rest are excluded from participation.—Note by Sir William Macnaghten, appended to case 6 in Chapter II of his Precedents of Hindú law.

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like, shall take half the wealth so acquired; but if his claim be solely grounded on paternity, he shall have two shares.' Now nothing is expressly said in regard to the patrimony being used or not: but as a son partakes of wealth acquired by his father, so a father likewise is entitled to partake of wealth acquired solely by his son. This is the only accurate exposition."

Exposition

"Half" must here signify 'equitable part,' by the rule which expresses that equal parts are intended when the proportion is not specified. On the question, whether that half be one share as the moiety of two, or half of the whole, JÍMÚTA-VÁHANA says, 'half of the whole sum.' For if half of two shares were implied, why not say, 'or he shall receive one share *in other cases*'? Since the term 'two shares' must have some connection, therefore, to satisfy the question, two shares of what? 'Two shares of property acquired by a son,' must be affirmed; consequently, that being the subject of partition, it is obviously reasonable to infer, 'half of that property likewise, *in other cases*.'—*Coleb.* Dig., Vol. III, pp. 53, 55 and 56.

Vyavasthá.

566. In the case of an acquisition being made not with the use of the property of the father but with that of brothers, two shares will go to the father, two to the acquirer, and one share to each of the other brothers who thus aided in the acquisition.

Authority.

RAGHU-NANDANA:—"The father's participation of a double share takes place when the acquisition is not made with the use of the paternal property, or when it is made with the use of brothers' property: the acquirer, however, takes a double share. But when the brothers' wealth is used, then they also are to participate as intimated by a text of VYÁSA which will be hereafter quoted. The father's participation of a moiety, however, takes place according to the *Dáyabhága*, when the father's property is used, or when the father is endowed with excellencies. When no other's property is used, then the father takes a double share, the acquirer also, as such, is entitled to two shares, the rest get nothing: but when a brother's wealth is used, he also takes a share. This is the explanation of the distinction between a double share and a moiety."—*Dá. Ta. Sans.*, p. 24.

If the acquisition be made on his brothers' stock, Lawyers affirm it to be the opinion of RAGHU-NANDANA, that he who acquired the wealth, shall in this case also have a double share, for RAGHU-NANDANA says, 'when a brothers' stock was employed, the father shall have two shares, the acquirer two shares, and the rest one each:' and that seems accurate.—*Coleb.* Dig., Vol. III, p. 56.

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What distribution shall be made when the property is acquired by any one son through his own labour *on his brother's stock*? The answer is, the father shall in that case have two shares, and both his sons one share each.—*Coleb.* Dig., Vol. III, p. 57. But,—

567. If it were acquired on his brother's stock and on his own, by his own labour, the acquirer shall have two shares, the father two shares and he who supplied funds shall have one: and in both cases the rest of the brethren shall be excluded from participation. Such is the method consistent with reasoning to which the law assents. *Ibid.*, page 57. *Vyavasthá.*

568. If property be acquired, by the son of a son through supplies from his grandfather's estate, the grandfather shall have half, the uncles and the rest a share each, and the grandson, who acquired the property, two shares: but if no supplies were received from the grandfather's estate, the uncles and the rest shall not participate. Thus may be concisely stated.—*Ibid.*, p. 58. *Vyavasthá.*

Must not the text,* which ordains two shares, be considered as relating to wealth acquired by a son, and there is consequently no authority for the receipt of two shares by a grandfather. No; for, it would be unequal that the son of a son should partake of property, acquired by the grandfather himself, but the paternal grandfather should not participate property acquired by his grandson. The word "son"(*a*) is a mere instance of a general sense; else the same term could not be so accepted in the text of YÁJNAVALKYA.† *Ibid.* **Exposition.**

(*a*) The term "son" extends to the great-grandson; for, as far as that degree, descendants equally confer benefits by presenting oblations of food in the prescribed form of half monthly obsequies.—*Dá. Bhá.*, Chap. XI, Sect, i, § 34. **Explanation.**

The word "son," is inclusive also of the son's son, and grandson (in the male line), for through these, the exclusion from heaven denounced in such passages as "heaven awaits not one destitute of a son," is removed.—*Dat. Mím.*, Sect. i, para. 13. See *ante*, page 269. **Explanation.**

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* That is the foregoing text of KÁTYÁYANA.

† See *ante*, pages 29 & 30.

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Vyavasthá. **569.** The paternal grandfather does not partake of the wealth acquired by his grandson whose own father is living, but that father alone *does participate*, for he has the chief dominion over the person who makes the acquisition, and, since the acquisition was effected by the use of his funds, the paternal grandfather may take one share in proportion to the wealth employed.—*Coleb.* Dig., Vol. III, p. 59.

Vyavasthá. **570.** In the case of an acquisition made by the son of a daughter, should the property of the maternal grandfather have been employed, he shall take a share proportionate to the capital used; and the maternal uncles and the rest shall have no shares. But if the acquisition were made without such use of property, the maternal grandfather shall have no share.—*Ibid.*, p. 59.

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CHAPTER V.

ON PARTITION BY BROTHERS AND THE REST.

SECTION I.

WHETHER SEPARATION IS LAUDABLE.

571. The common abode of brothers is preferable during the lifetime of both parents, as well as after their demise. *Vyavasthá.*

VYÁSA :—For brethren a common abode is ordained so long as both parents live; but after their decease religious merits of separated brethren increase.—*Dá. Bhá.*, Chap. III, Sect. i, § 8. Authority.

SANKHA and LIKHITA :—Willingly let them live together; by union they exhibit thrift.* Authority.

NÁRADA :—"Let the eldest brother, of his free will, support the rest like a father, or let a younger brother, who is capable, do so. The continuance of the family depends on ability."—*Dá. Bhá.*, Chap. III, Sect. i, § 15. Authority.

MANU :—The eldest brother may take the entire possession of the patrimony; the others may live under him as *they lived* under their father.—Chap. IX, *v.* 105.

572. With the desire of increasing the performance of religious acts, partition may, however, be made among the co-heirs. *Vyavasthá.*

As said by MANU :—"Either let them thus live together or separate if they desire (*to perform*) religious duties, since religious duties are multiplied in separate houses, their separation is therefore legal *and even laudable.*"—Chap. IX, *verse* III.

GOUTAMA :—In partition there is increase of religious duties.—*Dá. Bhá.*, Chap. III, Sect. i, § 14.

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* See *Smri. Chan.*, Chap. I, Cl. 40.

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Authority. NÁRADA :—The religious duties of unseparated brethren are single. When partition, indeed, has been made, religious duties (*a*) become separate for each of them.*

Expositon. (*a*) '*Religious duties.*'] Duties relating to the worship of *manes*, deities and *Bráhmanas.**

VRIHASPATI :—Among co-heirs living in commensality, *i. e.*, with one dressing of food, the worship of *manes*, deities, and *Bráhmanas* takes place in one house only; but in a family of divided brethren, the above acts are performed in each house separately.*

Remark. As in this iron (*kali*) age, however, the eldest brother rarely possesses the qualities and virtues which would render him venerable as the father, and the younger brothers too rarely entertain such veneration for their eldest brother, and increase of the performance of religious duties is seldom the primary object of partition, so,—

Vyavasthá. **573.** Now, in most instances, partition is made, and separation effected, even without the desire of increasing the performance of religious duties.

SECTION II.

ON PARTITION BY BROTHERS AND THE REST.

Vyavasthá. **574.** After the death (natural or civil) of a proprietor, his sons and heirs or any of them may divide his estate, self-acquired as well as ancestral.

Annotations.

574. The right of the nephew to receive his father's share from his uncle, is explicitly declared in a passage of KÁTYÁYANA, (cited in 3 Dig., p. 7, text lxxix). And the power of *any one* of the co-heirs to exact partition of the joint property may be gathered from the *Mitákshará*, and is distinctly affirmed by JÍMÚTA-VÁHANA (in the *Dáya-bhága*), Chap. III, Sect. i, § 16.†—Colebrooke's opinion. *Vide* Stra. H. L., Vol. II, (F. E.) p. 293.

574. The Hindús are a patriarchal people, many families often living together as one, connected in blood, and united in interests;

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* *Smri. Chan.*, Chap. I, Cls. 42, 43.

† This passage runs thus :—"But partition takes place by the will of any one (of the co-heirs) as before intimated."

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MANU:—After the death of father and mother, the brothers (*b*) being assembled (*c*), may equally (*d*) divide among themselves the paternal (and maternal) estate; but they have no power over it, while their parents live.—Chap. IX, *v.* 104. Authority.

(b) The word "brothers" indicates heirs in general. (See *ante;* page 6). Consequently the meaning is that—'after the death of a proprietor his heirs can divide his property ancestral as well as acquired.' Explanati on

(c) Here the expression "brothers being assembled" contained in the (above) text of MANU suggests one case (of partition) by the use of the plural number as an instance, as otherwise there would be no partition at the choice of one or two. Thus,— Explanation.

JÍMÚTA-VÁHANA:—Since any one parcener is proprietor of his own wealth, partition at the choice even of a single person is thence deducible; and concurrence of heirs suggested as one case of partition, is recited explanatorily in the text:—"The brethren being assembled, &c." Else, since assemblage implies many, there could be no distribution between two; for no passage of law expressly propounds a division between two co-heirs.—*Dá. Bhá.*, Chap. I, § 35. Authority.

VYÁSA says:—"For brethren a common abode is ordained so long as both parents live; but after their decease, the religious merits of separated brethren increase."* Authority.

JÍMÚTA-VÁHANA, has, however, decided that partition is not lawful while the mother lives. But with the mother's consent partition is lawful.* Authority.

Consequently, according to the law of Bengal Proper,—

575. Partition after the father's death (natural or civil†) of the paternal and ancestral estate is lawful if made with the mother's consent. *Vyavasthá.*

Annotations.

with various relative dependants, to be provided for out of the aggregate fund; but subject always to separation, by a common consent, or at the instance of *any one*, or more, wishing to be disjoined, in his or their concerns; and subject also to the exclusion of any one or more, from participation in the inheritance, for causes to be hereafter enumerated.—Stra. H. L., Vol. I, p. 120.

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* *Dáya-bhága*, Chap. III, Sect. i, § 1, 2, 3, 6, 8, 13. See *ante*, pp. 421, 422.

† See *ante*, page 8—11.

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Exposition. (*d*) 'Equally'* means in equal proportions; no deduction of a twentieth part or the like being allowed to the eldest son and so forth.†

Exposition. Here the term equally indicates that their title is equal; that is, a deduction of a twentieth part, &c., is allowed by other brothers through affection and to preserve due respect, because elder brothers are venerable.—*Coleb.* Dig., Vol. II, p. 521.

Formerly larger portions made up with deductions, or additional shares, were allowed to eldest and other brothers—Thus—

Authority. MANU:—The portion deducted for the eldest is a twentieth part (of the heritage,) with the best of all the chattels; for the middlemost, half of that, or a fortieth;‡ for the youngest, a quarter of it, (or an eightieth.‡) The eldest and youngest respectively take their just mentioned portions; and if there be more than one between them, each of the intermediate sons has the mean portion (or fortieth.§) Of all the goods collected, let the first-born take the best article, whatever is most excellent in its kind, and the best of ten (cows or the like.)—Chap. IX, *vs.* 112—114.

But, among brothers equally skilled in performing their several duties, there is no deduction of the best in ten (or the most excellent chattel); though some trifle, as a mark of greater veneration, should be given to the first-born. If a deduction be thus made, let equal shares of the residue be ascertained (and received.) But if there be no deduction, the shares must be distributed in this manner:—"Let the eldest have a double share, and the next born a share and a half, the younger sons must have each a share." Thus is the law settled.—*Ibid.*, vs. 115—117.

A younger son being born of the first married wife, after an eldest son had been born of a wife last married, it may be a doubt in that case how the division shall be made. Let the son born of the elder wife take one most excellent bull deducted from the inheritance; the next excellent bulls

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* Used in the above text of MANU.

† *Vivâda-chintamani*, page 224.

‡ The fortieth part should be computed on the whole estate, not on the residue after deducting a twentieth part; for that is expressly declared by the term 'half of that.' The same should be also affirmed in respect of the eightieth part.—*Coleb.* Dig., Vol. II, p. 549.

§ This, however, must be understood as applicable to the case where the eldest and the one next to him are endowed with learning and other qualities, and the younger brothers are devoid of any good quality.—KULÚKA-BHATTA.

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are for those who were born first, but are inferior on account of their mothers, (who were married last.) A son, indeed, who was first born, and brought forth by the wife first married, may take one bull and fifteen cows; and the other sons may then take, each in right of his several mother: such is the fixed rule."*—*Ibid., vs.* 122—124.

There were also other kinds of deductions ordained by other sages, many of them are as follows :—

VRIHASPATI :—Two modes of partition are expressly ordained for co-heirs: one, in the order of seniority; the other, by allotment of equal shares. The eldest (or he) who is pre-eminent by birth, science, and virtuous qualities, shall receive two shares of the heritage; the rest shall share alike: but he is venerable like their father.† Authority.

VASHISHTHA :—Partition of heritage among brothers shall be thus made: the eldest shall take a double share, and the tithe of cows and horses; the youngest shall have the goats and sheep, and one house; the sword and other black iron, and the furniture of the house, shall belong to the middlemost.† Authority.

VISHNU :—Let sons produced by wives of equal class receive equal shares, but give the best chattel as a deducted allotment to the first born.† Authority.

HÁRÍTA :—When a herd of kine is to be divided, let the rest of the brethren give a bull to the eldest brother, or give him the best chattel, leaving to him the images of deities and the patrimonial house, let them remove and erect other habitations: or if they remain in the same court, the best apartment shall be assigned to the eldest, and successively the next best to the others.† Authority.

ÁPASTAMBA :—In certain countries a *suvarna*, a black cow, and the black produce of the earth, devolve on the eldest son, together with the utensils of the common father.† Authority.

SANKHA AND LIKHITA :—To the eldest son a bull shall be given, to the youngest, a house other than the father's habitation.† Authority,

GOUTAMA :—A twentieth part of the heritage, a pair (of kine,) a car with beasts which have teeth in both jaws, and the bull kept for impregnation, shall belong to the Authority.

* Thus MANU delivers four modes of unequal partition; and since partition cannot be made in four ways in the same case, it must be affirmed that he intends a distinction according to circumstances. Such is the opinion of KULLÚKA-BHATTA, CHANDESHWARA, and others.—*Coleb. Dig.*, Vol. II, p. 553.

† See *Coleb. Dig.*, Vol. II, pp. 546—587.

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eldest; cattle blind of one eye or old, and those of which the horns are broken, the tail hairless, shall belong to the middlemost, if there be two or more head of such cattle; a ewe, some grain, iron, a house, a cart and yoke, and one of every sort of quadruped, shall belong to the youngest, the residue shall equally be divided. One bull shall be the additional portion of an eldest son (born of a wife last married, or if) produced by the first married wife, he shall have a bull and fifteen cows; or the same deduction (which is granted to an elder son born of a wife last married,) shall be received by a younger son born of an elder wife. Or the first-born shall first choose and take any one chattel, and ten head of cattle, (and the rest shall successively make a similar selection.*)

Authority. Citing the Scripture,—"Let equal shares be given to all without distinction, or let the eldest deduct the most excellent cattle; or let the first born take one of ten (cows and the like,) and let the rest share equally," the text of BOUDHÁYANA directs the best chattel to be given to the eldest, and one out of ten cows or other decade of homogeneous things.*

Authority. BOUDHÁYANA :—On the death of the father, the portion of the eldest son is, in the order of the four classes, a bull, a horse, a goat, and a sheep.*

Authority. NÁRADA :—To the eldest a greater portion shall be given, a worse (or inferior) share is ordained for the youngest; the rest shall have equal allotments, and an unmarried sister shall also have a portion.*

Authority. DEVALA :—The mean portion (or fortieth part) is ordained for sons who have equal pretensions; but let the tenth part of the heritage be given to the eldest who conducts himself according to law.*

Remark. It appears, however, from the subjoined passages that the brothers who were distinguished by science, virtue and excellent qualities were entitled to deductions or larger shares, but not those who were not so, while, on the other hand, those who were addicted to vice lost their title to inheritance :—

VRIHASPATI :—Of those sons, he who is endowed with science(*e*), and qualities, is entitled to receive a greater portion. All the sons shall succeed to their father's estate,

* See *Coleb.* Dig, Vol. II, pp. 546—587.

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as is ordained; but he who is distinguished by science and good conduct, shall take a greater share than the rest. Progenitors become truly the parents of a son whose fame is spread in this world for science, skill in arts, courage, wealth, and for knowledge, liberality, and virtuous actions.—*Vi. Chi.*, p. 324.

VRIHASPATI :—Two modes of partition are expressly ordained for co-heirs: one in the order of seniority; the other by allotment of equal shares. The eldest (or he) who is pre-eminent by birth, science (*e*) and virtuous qualities, shall receive two shares of the heritage, the rest share alike: but he is venerable like their father.*

(*e*) 'Science.'—Knowledge of the *Vedas* and other branches of sacred literature.—*Coleb.* Dig., Vol. III, p. 81.

The knowledge of the *Vedas*, the practice of the religious actions ordained in the *Vedas*, not deceiving a younger brother, as well as other good qualities render one entitled to a deduction.—SRÍ-KRISHNA'S commentary on the *Dáyabhága, Sans.*, p. 80.

MANU :—All those brothers (whether first born or younger) who are addicted to any vice, lose their title to inheritance. See Exclusion from inheritance.—Chap. IX, *v.* 214.

Thus, it is manifest from the passages above cited, that, to deserve a greater share whether made up by the addition of a whole or half a share, or by the addition of a deduction or deductions prescribed by MANU or by any other sage, as above, the eldest, the next born, or any other brother, must be endowed with transcendent learning and virtuous qualities. But since persons endowed with such learning, virtues and good qualities are rare in the present (*Kali*) age, and since younger brothers in the present age entertain not great veneration for their elders, therefore,— Conclusion.

576. It has been concluded and determined that in this age neither the eldest brother can have a double share, nor any other brother a larger share as ordained by MANU and the rest.† *Vyavasthá.*

577. For the same reason, the deduction of a twentieth part with the best chattel, or of a fortieth, or eightieth part, as ordained by MANU, or *Vyavasthá.*

* See *Dá. Bhá.*, Chap. II, § 42, 80.—*Coleb.* Dig. Vol. III, p. 81.

† See *ante*, pages 506—508.

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any other kind of deduction as ordained by any other legislator, is disallowed in the present (*Kali*) age.

Vide Precedents, pages 707, 708, 717, 718, 725—735.

Vyavasthá. **578.** But even if a brother, endowed with such learning, good qualities and virtues as would entitle him to a greater share, (made up by the addition of a full or a half share or a deduction,) were to be found in this (*Kali*) age, yet now the bestowal on him of a share with a deduction or deductions, or of a share larger than that of another brother, unless it be customary in the family, is abrogated and obsolete.

Vide Precedents, pages 707, 708, 717, 718, 725—735.

Although this unequal partition is found in the sacred ordinance, both during the life and after the death of the father, yet on account of other texts *equal* division has been the rule in the *Kali* (or present) age.—Since, it is laid down by the prince of contemplative sages:* "Practise not that which is legal, but is abhorred in the *loka* (*f*), for it secures not celestial bliss."—*Vír. Mi.*, (*Sans.*,) p. 174.—See *Mit.* Inh., Chap. I, Sect. iii, § 4, 6, 7; and *Vyav. Chap.*, Vol. II, Part i, pp. 298, 299.

Annotations.

576—578. In former times, the right of primogeniture prevailed to a certain extent, but that with other usages has been abrogated in the present or (*Kali*) age.—Macn., H. L., Vol. I, p. 17.

572—574. The rules concerning these deductions varying, their diversity is endeavoured to be reconciled by the supposition of relative and superior good qualities—a criterion of title admitted to depend upon reasoning, too subtle to be allowed much influence in the determination of civil rights. Altogether obsolete as the pretension is, upon partition among brothers, and optional in any case on the part of the father in his life-time, while he is restricted from acceding to it, where the property is hereditary, the law upon it has become a matter of mere curiosity. Disregarding, therefore, all distinctions of the above kind, the general rule is, that it must be equal.—Stra. H. L, (F. E.,) Vol. I, p. 122.

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* YÁJNAVALKYA, who is otherwise called "YOGÍSHWARA (Prince of contemplative sages.)"

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SANGRAHA-KÁRA:—"As the duty of an appointment (to raise up seed to another) and as the slaying of a cow for a victim are disused at the present day, so is now (*f*) partition with deductions."—*Vide Smri. Chan.*, Chap. III, Cl. 16. Authority.

(*f*) The words "at the present day," and "now" are both used in the above text in order to indicate the present (*Kali*) age.—*Ibid.*, Cl. 17,

JÍMÚTA-VÁHANA:—It must not be argued, that the practice of equal partition is indispensable as the only mode authorized by law. For the brethren may consent to the deductions by reason of great veneration (for the eldest). An option exists like that of making or omitting partition. Accordingly, since persons of the present day who are younger brothers entertain not great veneration (for the eldest,) equal distribution is alone seen in the world; as also because elder brothers deserving of deducted allotments are now rare.—*Dá. Bhá.*, Chap. III, Sect. ii, § 26, 27. Authority.

The compilers of laws—SHAMBHU, SRÍKARA, DEVA-SWÁMÍ and the rest, have published volumes even in the present age on the subject of deductions, &c., under the impression that they are in some instances allowed by the usage of the great. The learned have, however, decided with reference to religious books, *puránas*, &c., that no such usage of the great exists in the *Kali* age.—*Smri. Chan.*, Chap. III, Cl. 24. Remark.

579. Deductions or larger shares are always disallowed among *Shúdras*.—*Dá. Ta. Sans.*, p. 56. *Vyavasthá.*

MANU:—A woman of the same class only and not of a different class may become the wife of a *Shúdra*. Those that are born of her, become *equal* sharers, although there may be a hundred sons.—Chap. IX, *v.* 157. Authority.

Of the sons, he who is endowed with science and qualities,* is entitled to receive a greater portion. If it be alleged that as this text of VRIHASPATI has a general import regarding deductions, why should not the *Shúdras* be entitled to deductions on account of good qualities. The reply is, no, they cannot be, inasmuch as they cannot be endowed with such qualities.*—*Coleb.* Dig., Vol. II, pp. 578, 579. Authority.

* Qualities which entitle one to deducted allotments are: knowledge of the *Vedas*, practice of the religious acts ordained by the *Vedas*, not deceiving a younger brother and the like. (SRÍ-KRISHNA's commentary on the *Dayá-bhága*, page 80.) But *Shúdras* are not allowed to study the *Vedas*. See *Coleb.* Dig., Vol. II, pp. 578, 579. See *ante*, page 509.

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Vyavasthá. **580.** Thus, in the present age, no larger share, anyhow made up, being allowed to a brother of the same description, the shares of such brothers are equal in all respects.

Vide Precedents, pages 707, 708, 717, 718, 725—735.

Authority. So says USHANAS:—"The distribution among brothers born of women of the same tribe is ordained to be made *equally*.

Authority. After speaking of a father, HÁRÍTA, says:—"If he be dead, the partition of inheritance should be made *equally*."*

Authority. POITHINASI says:—"When the paternal inheritance is to be divided, the shares shall be *equal* among the brothers."*

Authority. YÁJNAVALKYA too declares:—"Let the sons divide *equally* the effects and debts after the death of both parents."*

Authority. So also VRIHASPATI:—"Sons inherit the paternal estate; the shares of all are *equal*."—See *Smri. Chan.*, Chap. II, Sect. ii, § 17.

Remark. JAGAN-NÁTHA says,—"It should be here noticed, that, at this time, in our country, the practice of deducting a twentieth part or the like is almost wholly disused, but some chattel of small value is given to the eldest as a token of veneration (1): (simply on account of his seniority in birth)."—*Coleb.* Dig., Vol. II, p. 587.

The above is also the opinion of the RATNÁKARA,† and many other authors,† and quite consistent with reason. See *ante*, pp. 482, 483, 506—508.

Remarks. But although the eldest brother deserves to get something more than the other brothers, by reason of his producing great spiritual benefits to his father by delivering him from

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Annotations.

(1) Upon the authority of the above dictum of JAGAN-NÁTHA, Sir Thomas Strange says, "The eldest had, moreover, a claim, not only to the best chattel, but, upon partition among brothers, to the best apartment of the house, the rest being distributable according to the pretensions of each. But to entitle him to these privileges extraordinary merit was required to be combined with primogeniture, otherwise some trifle only was to be given him, to distinguish him as the eldest.—Stra. H. L., (F. E.) Vol. I, p. 122.

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* *Dá. Bhá.*, Chap. III, Sect. ii, § 25.

† See *Vyav. Chan.*, Vol. II, Part i, pp. 286, 287, 325, 326.

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the hell called *put* and so forth,* yet the allotment thereof is dependent on the option of the younger brothers, inasmuch as it is not ordained by any lawgiver that the eldest can realize it by having recourse to law in case it be not given amicably.

581. As brothers are entitled to divide and share the paternal and ancestral estate, so are their nephews and grand-nephews whose fathers and grandfathers are dead, (physically or civilly†), or their heirs and representatives. See *ante*, p. 493. *Vyavasthá.*

Vide Precedents, pages 719—721, 735, 746.

With this difference, however, that—

582. Brothers share *per capita*, whereas fatherless nephews are entitled to have collectively their father's share, and a deceased brother's grandsons, whose father or fathers also are dead, are entitled to have their grandfather's portion, which they are to sub-divide *per capita*, in the case of their being the sons of one father, otherwise with reference to their fathers.‡ See post, p. 519. *Vyavasthá.*

Vide Precedents, pages 705, 716, 720, 721, 735, 746.

YÁJNAVALKYA :—Among those whose fathers are deceased, the allotment of shares is according to the fathers.‡ Authority.

VRIHASPATI :—Their sons of unequal number are declared to take the shares of their respective fathers.‡ Authority.

The meaning is, where the sons of the deceased fathers are of unequal number, that is, of greater or less number, Exposition.

Annotations.

581. Nephews whose fathers are dead, are entitled, as far as the fourth in descent, to participate equally with the brethren. These take *per stirpes*, and any one of the co-parceners may insist on the partition of his share.—Macn. H. L., Vol., I, p. 50.

The right of a nephew to receive his father's shares from his uncle is explicitly declared in a passage of KÁTYÁYANA, (cited in 3 Dig., p. 7, text ixxix). Colebrooke's opinion.—See Stra. H. L., Vol. II, (F. E.,) p. 293.

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* See *ante*, pp. 32, 33. Notes, and pp. 482, 483.

† See *ante*, pages 8, 9. ‡ See *ante*, page 21.

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the sons of each father take the share of their own father only. For example: when one has a single son, another two, and a third, many; the only son receives one share in right of his father, the two sons take one share appertaining to their father, and similarly the many sons obtain one share due to their father.—*Smri. Chan.*, Chap. VIII, Clause 4.

Vyavasthá. **583. If any of the brothers in whom the inheritance vested die leaving no son, son's son, or son's son's son, but any other heir, such heir also is entitled to take the deceased's share in the partition made by his brothers or their heirs.**

Vide Precedents, pages 708, 713, 714.

SECTION III.

ALLOTMENT TO THE UNMARRIED DAUGHTER OR DAUGHTERS OF THE DECEASED PROPRIETOR.

MANU:—To the unmarried daughters let their brothers give portions out of their own allotments respectively, according to the classes (of their several mothers), let each give (*a*) a fourth part of his own distinct share; and they who refuse to give shall be degraded.—*Coleb.* Dig., Vol. III, page 92.

VRIHASPATI:—On the death of the father, the mother (*janani*) has a claim to an equal share with her sons; the mothers (*mátarah*) take the same share; the unmarried daughters each a fourth of a share.—See *Vi. Chi.*, p. 240.

KÁTYÁYANA:—For unmarried daughters a fourth share is ordained, and three shares for sons; but if the estate be small, the daughter is considered as having a right to *a sufficient portion, without determining the rate.*—*Coleb.* Dig., Vol. III, p. 97.

(*a*) Let each give.] From the mention of giving, (and) the denunciation of the penalty of degradation, if they refuse, it appears that portions are not taken by daughters as having a title to succession. For one brother does not give a portion out of his allotment to another brother, who has a right of inheritance.—*Dá. Bhá.*, Chap. III, Sect. ii, § 37.

YÁJNAVALKYA saying,—"Uninitiated brothers should be initiated by those for whom the ceremonies have been already performed; but sisters should be disposed of in marriage, giving them, as an allotment, a fourth part of a brother's own share," declares the obligation of disposing

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of them in marriage, not their right of succession.—*Dá. Bhá.*, Chap. III, Sect. ii, § 38.

Thus (since the daughter takes not in right of inheritance*), if the wealth be great, funds sufficient for the nuptials should be allotted. It is not an indispensable rule that a fourth part shall be assigned.—*Ibid.*, § 39.

VISHNU says:—But of maiden daughters the ceremony of marriage should be performed, according to one's own inheritance.—*Dá. Ta.*, Chap. III, § 19.

RAGHU-NANDANA holds that the texts which ordain the allotment of a fourth share (to a maiden daughter) are to be construed to signify the allotment of property sufficient for marriage.—See *Dá. Ta.*, Chap. III, § 20.

Accordingly the said author has laid down the following principle which is held to be the *Vyavasthá* on this subject.

584. To the unmarried daughter's property sufficient to defray the expenses of their marriage should be given.†—*Ibid.*, § 19. *Vyavasthá.*

As is said by DEVALA:—"Wealth sufficient for marriage should be allotted to the unmarried daughters out of the estate of the father."—*Ibid.* Authority.

The above principle has, in another place, been confirmed by the said author in these terms: "Here (it is to be understood that) the right of sisters extends to so much property as is sufficient for their marriage, because it is so declared by the sages as well as the authors of Digests."—*Dá. Ta.*, Chap. XI, § 48. Remark.

JAGAN-NÁTHA says,—"HALÁYUDHA and others‡ hold that so much only should be given as is sufficient to defray the expense of sacrament or marriage; but a fourth part is mentioned by way of example."—*Coleb.* Dig., Vol. III, page 92.

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* MAHESHWARA.

† See *ante*, pages 141, 142.

‡ Such, indeed, is the opinion of the authors of the Bengal school.—See *ante*, pages 141, 142.

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SECTION IV.

ON ALLOTMENT OF A SHARE TO THE MOTHER.

Vyavasthá. **585.** If partition of patrimony is made during the life-time of the mother, then she is to get a share equal to that of her (each) son.* See post, page 519.

Vide Precedents, pages 737, 739, 741, 745, 746, 749.

Authority. When partition is made by brothers of the whole blood, after the demise of their father, an equal share should be given to the mother—*Dá.-bhá.*, Chap. III, Sect. ii, § 29.

Authority. VRIHASPATI:—The mother on the death of her husband takes a share equal to that of (each of) her sons.*

KÁTYÁYANA:—The mother also on the demise of the father, takes a share equal to her son's.*

Authority. If, however, partition is made during the life-time of the mother, then she must be made an equal sharer with her own sons.—*Dá. Kra. Sang.*, Chap. VII.

Authority. Since the term mother intends the natural parent, it cannot also mean a step-mother. For the word employed once cannot bear the literal and metaphorical senses at the same time.—*Dá. Bhá.*, Chap. III, Sect. ii, § 30.

Annotations

585. The mother has a contingent right which may be enforced by her upon a partition of her husband's estate being made. Her original right is to maintenance only—which is to be suitable to the wealth of which her husband died possessed; but it is by the *act of others* that she becomes entitled to any specific share. The reason given for this is modern but satisfactory. She has a right to participate in all the comforts which are enjoyed by her family in its undivided state, and a legal as well as natural claim to that protection which may be derived from a union of her descendants. If therefore she is deprived of such advantages, it is but just that she should be enabled to take care of herself, and not be obliged to go from door to door for her support. The doctrine is rational, and I have not been able to discover that it is anywhere contested.—Sir Francis Macnaghten's considerations on the Hindú Law, page 57.

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* See *Dá.-Bhá.*, Chap. III, § 29—31; *Dá. Kra. Sang.*, Chap. VII, § 2-3, and *Dá. Ta.*, Chap. III, § 13.

Sir William Macnaghten (in his book on the Hindú Law, Vol. I, page. 50) treats of the right of the mother in partition; but what he has written seems to be insufficient as well as inaccurate, as will be found by reference to the *Vyavasthás* and authorities herein contained.

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586. Here since the term mother relates to natural parent, the step-mother does not participate, but she must be maintained with food and raiment.—*Dá. Kra. Sang.*, Chap. VII, § 3. *Vyavasthá.*

Vide Precedents, pages 743, 744.

According to JÍMÚTA-VÁHANA, RAGHU-NANDANA, SRÍ-KRISHNA TARKÁLANKÁRA, and the rest, when partition is made by a father, a share equal to that of a son's must be given to the wife who has no son, not to her who has male issue; her son should be considered as alone entitled to (share in) the partition: this agrees with common sense. But, when partition is made by sons, no share need be allotted to the step-mother, who has no male issue, but food and raiment (must be assigned); for the late owner of the property was bound to support her.—It is a settled rule, that a widow will receive from sons who were born of her, an equal share with them, and she cannot receive a share from children of another wife.* Exposition.

587. The equal participation, however, of the mother with her sons takes effect, if no separate property have been given her by her husband or any of his kinsmen: but if any have been so given, she is to have *ardha* or a portion which together with the *stri-dhan*, will be equal to a son's share. *Vyavasthá.*

Vide Precedents, pages 737—739.

For authorities, &c., see *ante*, pages 199—201, 488—490.

588. If the sons refuse to deliver the share of their natural mother, she may exact it even by forcible means. For the ordinance would be otherwise nugatory.* *Vyavasthá.*

589. When the father of an only son leaves one wife, then (not a share, but) food and vesture only shall be allotted to her.* *Vyavasthá.*

Vide Precedents, page 751.

Annotations.

585, 586. It will have been seen that in cases of partition, the mother's right depends upon the parties by whom the division may be made; that it must be made by her own descendants; and that

* *Coleb.* Dig., Vol. III, pp. 13, 29, 30, 31.

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Since the law has only ordained the allotment of a share to the mother or step-mother when *partition* is made among sons.—*Coleb.* Dig., Vol. III, p. 31.

Vyavasthá. **590.** If the uterine brothers separate from their half brothers, their respective mothers will not be entitled to shares.

If a man leave two wives, and by one two sons and by the other four, partition shall be made, as above mentioned, among the brothers of the whole blood and half blood; but what shares shall be allotted to their respective mothers? To this CHANDESHWARA and the rest would reply, the estate must be divided into eight shares, and two must be given to the mothers, for they are equally wives of the father; and the six brothers take six shares. However, SRÍ-KRISHNA TARKÁLANKÁRA observes in his commentary on the *Dáya-bhága* that 'both are not entitled to shares, since both are not natural mothers of all the sons; and the natural mother, according to JÍMÚTA-VÁHANA and the rest, is alone entitled to a share.'—*Coleb.* Dig., Vol. III, p. 29.

Authority.

Vyavasthá. **591.** But when one set of uterine brothers shall come to a partition *among themselves*, then their mother will be entitled to a share equal to that of one of her sons: otherwise not.

Illustration. If A shall have three widows, one the mother of B, C and D; one the mother of E, F and G; and one the mother of H, I and K; upon a separation of these three sets of uterine brothers from *each other*, they will form three joint and undivided families, and their respective mothers will not be entitled to a separate share, but if one set shall come to a partition *among themselves*, then *their* mother will be entitled in severalty to a fourth part of their estate. If another set (E, F and G for instance,) shall all die without having come to a partition; E leaving sons, F leaving grandsons, and G leaving great-grandsons, then the sons of E, the grandsons of F, and the great-grandsons of G, will form a joint and undivided family, and the mother of E, F and G will not be entitled to any separate share.—Cons. H. L., p. 42. Similarly,—

Vyavasthá. **592.** At the time of partition with half brothers, if the uterine brothers also separate from

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Annotations.

the childless widow, or the widow who had borne daughters only, will not be entitled to participate in the event of her husband's descendants coming to a partition of his estate.—*Ibid.*, p. 57.

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each other, or any of them from the rest, taking their shares, or his share, in severalty, in that case the mother of these is entitled to an equal share out of her own sons' shares.*

Vide Precedents, pages 745, 746.

Inasmuch as at the same time partition takes place amongst her own sons themselves. Reason.

If there be three widows, one the mother of three, one the mother of four, and one the mother of five sons; the rule as to partition will be the same as it is when they are mothers each of an equal number of sons; that is, if the uterine brothers separate from their half-brothers, and continue united among themselves, their respective mothers will not be entitled to any several share; but if they come to a partition *among themselves*, then the mother of the *three* sons will be entitled to a *fourth*—the mother of the *four* sons to a *fifth*, or the mother of the *five* sons to a *sixth* part in severalty.—Cons. H. L., p. 43. Illustration.

If A shall die leaving a widow, the mother of B, C and D, and these three sons survive him; If B then shall die leaving three sons E, F and G,—and C die leaving four sons H, I, K and L,—and L die leaving two sons M and N, and a partition then take place between the several parties, *i. e.*, D the surviving son of A; E, F and G, the sons of B; H, I and K, the sons of C; and M and N, the sons of L; the estate of A shall in the first instance, be divided into four parts, of which his widow will take one; D his surviving son will take one; E, F and G, the sons of B, will take one; and the descendants, the sons and grandsons of C, will take one; or if all the parties separate from each other, then the estate of A being divided into forty-eight parts, his widow will take twelve, D will take twelve; E, F and G, four each; H, I and K, three each; and M and N, one and a half each or three between them.—Cons H. L., page 40. Illustration.

We have seen that on a primary partition in the last mentioned case, the widow of A will be entitled to a fourth part of his estate; that his surviving son D will be entitled to a fourth part; that the sons of B will be entitled to a fourth part; and that the descendants of C, will be entitled to a fourth part. Now let us suppose the widows of B, C and L, to be living when their sons respectively come to a partition among themselves; then the proportion of E, F and G shall be divided into four parts, of which the widow of B will take one, and E, F and G one each. The proportion of H, I and K shall be divided into four parts, of which the widow of C will take one, and H, I and K one each. The proportion of M and N shall be divided into three parts, of which the widow of L will take Illustrations.

* See *Coleb.* Dig., Vol. III, pp. 29, 30, 31.

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one, and M and N one each. But upon the primary partition, A's will be the only widow entitled to a share. The claims of the other widows will not arise, until partition be made among their own sons.—Cons. H. L., p. 40.

Vyavasthá. **593.** If any of the sons or the heir of a son deceased be separated from the rest, then also the mother shall be entitled to a share equal to that of one of her sons. Thus,—

Vyavasthá. **594.** The mother is entitled to a share equal to that of a son, not only on partition between her sons themselves, but also between a son and the heir or representative of another son, deceased.

Vide Precedents, pages 741—746.

Illustartion. If A shall have three sons B, C and D, by one wife, and if A shall die, leaving his sons B and C, and his grandsons E, F and G, by his son D, and his widow, the mother of B, C and D, surviving, then upon partition made between B, C, E, F and G, the mother of B, C and D (*i. e.* the widow of A) shall take one-fourth of his (A's) estate, or as much as E, F and G, (sons of D) shall take among them jointly. The same rule will hold, if two of her sons had died, and if partition had been made between her living son and the sons of her two deceased sons;—as, if C and D, had died, she will in this case also take one-fourth of A's estate—she shall take one share—her living son B shall take one share—the sons of C, shall take one share among them,—and the sons of D, shall take a share among them.—Cons. H. L., p. 52.

Annotations.

593, 594. In the case of *Gooru-prasad Bose* versus *Shib-chunder Bose*, &c., the court made further enquiry, and obtained the best information;—we were ultimately satisfied that, upon a partition by her son and grandson, *Khanjani* was entitled to share, as she would have been had the partition been made by her sons.—Cons. H. L., page 29.

593, 594. It is well established that she is entitled to a share, if her sons, her grandsons, or her sons and grandsons should divide the estate.—As there is nothing to exclude her in the case of a more remote descendant being a party to the portion; it is, I think both reasonable and just that she should have her share although such a person should change to be one of the partitioners.—Cons. H. L., p. 30.

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595. If one of the brothers or the heir of a deceased brother shall take his share of either the movable or immovable property, this will give the mother a right to her separate share of the same description of property. *Vyavasthá.*

596. Like a brother the mother also is entitled to a share of the property acquired by the use of the patrimonial wealth. *Vyavasthá.*

597. If the mother happen to be the heiress of a son deceased, she shall, as such, inherit his share, and also on partition she shall, as mother, get another share equal to that of one of her sons. *Vyavasthá.*

Vide Precedents, pages 741—744.

598. The share which is given to a mother, in the partition as above, is given to her in lieu of *Vyavasthá.*

Annotations.

593, 594. If there be any number of sons, and one be by any means separated from the others ; even if he should be separated by authority of the magistrate, without the consent of any of them or against the will of all, the mother shall be entitled to her several share.—Cons. H. L., p. 47. See *Ibid.*, p. 42.

595. If brothers of an undivided family shall possess immovable as well as movable property, and if one brother shall take his share of the movable property to his own separate use, continuing to possess the immovable property joint and undivided, with his brothers ; this will give the mother a right to her separate share of the movable, but not of the immovable property.—Cons. H. L., p. 46.

596. The mother shall not be entitled to share in the property acquired by the individual exertions of one of her sons, nor in the property acquired by the joint exertion of them all, unless it shall appear that such acquisitions were made out of the patrimonial wealth, in which case, she shall be entitled to share in the *increase* of the patrimonial wealth, upon partition.—*Ibid.*, p. 51.

595, 598. I believe it may now be laid down as the law, that mothers who take a share upon partition, take an estate *for life* only,—

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maintenance, and, means allowing, also for the performance of religious acts; and it reverts, after her death, to those heirs of her husband out of whose portion that share was allotted to her. Her dominion over such property is, therefore, more restricted than that of the widow who succeeds to her husband's estate by right as heiress and represents that estate.—See *ante*, pp. 47—60, 491, 492.

Vide Precedents, pages 741—743, 745—747.

Authority. JAGAN-NÁTHA:—She cannot alienate the above or apply it to a purpose other than that for which it is given her by them who were bound to maintain her from her husband's estate, and who will receive it back after her death when it is no longer required to be so set apart.—*Coleb.* Dig., Vol. III, pp. 22 and 23.

JAGAN-NÁTHA further says:—"If the share allotted to a wife or mother be consumed in her support, she is entitled to receive alimony from her husband or son; for, at all events,

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Annotations.

and with respect to dominion over the property, stand upon the same footing with widows who succeed to their husband's right. It has been said that what is taken by a mother upon partition, is more in the nature of a gift than that which is taken by a widow on the death of her husband. If *all* the sons agreed to divide, it might indeed be said to be in the nature of a gift, because they would all have concurred in the act by which their mother became entitled to a share of the estate—yet if there be ten sons, any one of them may enforce partition; and although the other nine continue living in an undivided state, and although the tenth separated himself from them against their will, his separation alone will give the mother a gift in severalty to one-eleventh part of the estate. In such a case, what she takes can hardly be said to be in the nature of a *gift*—certainly it is not a gift from her sons; nine of them out of ten being desirous of withholding from her, that which one enables her to take by compulsion from the rest;—but whatever the reason may be, the law is conclusive upon the subject. She has a right on partition being made, although the greater number of her sons may have been unwilling to divide. The Supreme Court has not hitherto made any distinction between the interest taken by a mother upon partition, and that taken by a widow upon the death of her husband.—Cons. H. L., pp. 43, 44.

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she must be maintained: but if a surplus remain above consumption, and the husband's wealth be wholly dissipated, he may, by parity of reasoning, resume property from his wife, as *he might resume it* from his son."—*Coleb.* Dig., Vol. III, p. 26.

SECTION V.

On Allotment of a Share to the Paternal Grandmother.

599. When the paternal grandfather's estate is divided by grandsons, the grandmother is entitled to a share equal to that of a grandson.* *Vyavasthá.*

Vide Precedents, pages 743—745.

Annotations.

594, 599. The Supreme Court *Pandits* say, 'if a son be one of the partitioning parties, with great-grandsons that she (the widow of the deceased) ought to take a son's share; and if a grandson be such a party, that she ought to take a grandson's share. They think themselves justified in this opinion by the principles of law, although the law itself is not expressly declared.—Cons. H. L., p. 52.

594—597. The following case was put by me to the Supreme Court *Pandits:* "Supposing the mother of E, F and G to be living, when the sons of E, the grandsons of F, and the great-grandsons of G come to a partition—What share, if any, will the mother of E, F and G take upon that partition? It will be between her *grandsons*, her *great-grandsons*, and *great-great-grandsons*." I was told that the Hindú law did not make any provision for such a case. I reminded them that the Hindú law gave a grandson's share to the grandmother upon a partition made among her grandsons—and a son's share upon a partition made among her sons and her grandsons. This they admitted to be the law. I asked them if it was not reasonable that she should take a grandson's share upon a partition made among her grandsons and her more remote descendants. The reasonableness of the thing they acquiesced in, and said, if such a case arose, they supposed it would be so decided, that she would get a grandson's share.—Sir Francis Macnaghten's Considerations on the Hindú Law, pages 42, 43.

592, 595. Partition, to entitle the mother to a share, must be made of ancestral property or of property acquired by means of

* See *Dá.-Bhá.*, Chap. III, Sect. ii, § 32; *Dá. Kra.*, Chap. VII, § 4; *Dá. Ta.*, Chap. II, § 19; and *Coleb.* Dig., Vol. III, p. 27.

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Authority. When partition is made, by the grandsons, of the property of their grandfather, a share ought to be given to the grandmother, in the same manner as a share is given to the mother when paternal property is divided.—*Dá. Ta.*, Chap. II, § 19.

Authority. In like manner, in a partition about to be made of the grandfather's wealth by grandsons, the grandmother must be made an equal sharer.—*Dá. Kra. Sang.*, Chap. VII, § 4.

Authority. VYÁSA :—Even childless wives of the father are pronounced equal sharers; so are all the grandmothers: they are declared equal to mothers.—*Dá. Bhá.*, Chap. III, Sect. ii, § 32.

Remark. Some say that the grandmother here signifies the father's natural mother, for the reasons before explained. But others infer from the use of the plural number, and the mention of 'all', that all the wives of the grandfather shall have shares.—SRÍ-KRISHNA'S Commentary on the *Dáyabhága, Sans.*, p. 82. But,—

Exposition. By the expression '*equal to mothers*' it is shown that as the mother is entitled to an equal share in the partition of of her husband's property made by her own sons, so in the partition of the grandfather's property made by the grandsons, the grandmother has an equal share with them.—*Dá. Kra. Sang.*, Chap. VII, § 4.

Remark. In this instance likewise the contemporary wives of the grandmother are not entitled to participate; they need only be maintained. For the reason above stated, the term grandmother refers exclusively to the natural parent of the father. This is the received opinion. But in truth, the word '*all*' being used in the text above quoted, and the word '*grandmothers*' being in the plural number, it is reasonable that the contemporary wives of the grandmother be also entitled to participate.—*Ibid.*, § 5, 6.

Annotations.

ancestorial wealth. Therefore if the property have been acquired by A, the father of B, C and D,—and B, C and D come to a partition of it, their mother (the widow of A,) shall, but their grandmother shall not, take a share; and if the estate shall have been *acquired* by B, C and D, themselves, then neither the grandmother, nor the mother, will be entitled to a share upon partition of it.—Cons. H. L., p. 54.

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When the patrimony left by the paternal grandfather is divided, the allotment of a share to the wives of that ancestor is ordained. Modern lawyers hold, that shares must in that case be allotted even to those wives of the paternal grandfather who have no sons.—*Coleb.* Dig., Vol. III, p. 24. Remark.

600. Like the share of a mother, the share of a grandmother too should be made up with the *stri-dhana,* if any, given to her by her husband or a kinsman of her husband.—See *ante,* page 517. *Vyavasthá.*

Vide Precedents, pages 737—739.

When partition is made among sons or grandsons, they must allot, to their natural mother or grandmother, an equal share with themselves; but, if female property have been given to any one wife by a kinsman sprung from the same race with her husband, that shall be included in completing her share.—*Coleb.* Dig., Vol. III, p. 27. Authority.

When a distribution is made by a father, if his own mother be living, no share is ordained for her; since the law has only ordained the allotment of a share to the mother, when partition is made by sons with each other.—*Ibid.*, page 31. Remark.

601. The grandmother is entitled to take a grandson's share not only upon partition between her grandsons themselves, but also upon partition between a grandson and the heir or representative *Vyavasthá.*

Annotations.

601. Since that time, I have had several conferences with the Supreme Court *Pandits* on the subject of a woman's right to a share, if one of the partitioning parties should be a great-grandson. They have invariably said that the law is silent; but that from reason and analogy, she ought to have a share, and if such a question arose, they supposed it would be decided that she should have one. Yet it would seem to entitle her to a share, that there must be some more proximate descendant than a great-grandson, party to the partition; for if the partitioning parties be all so remote as great-grandsons, it does not appear that her claim can, in any manner, be supported. The *Pandits* are of opinion, if one of her sons be a party, that she ought to have a son's share, and if her sons be all dead, and one of her grandsons be a party, that she ought to

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of another grandson, deceased; such person standing in the place of the deceased.

Vyavasthá. **602.** If any of the grandsons or the heir or representative of a deceased grandson take his share of the whole or any part of the estate, even then the grandmother is entitled to her share of that part of the estate.*

Vyavasthá. **603.** If the grandmother happen to be the heiress of a grandson deceased, she will, as such, inherit his share, and also on partition, she will, as grandmother, get her proportionate share.†

Vide Precedents, pages 741—744.

Vyavasthá. **604.** The share which is given to a grandmother upon the partition as above, is given her for maintenance, and, means allowing, also for the performance of religious acts; so her dominion over such property is more restricted than that of the widow who succeeds to her husband's estate by right as heiress† and represents that estate.—See *ante*, pages 47—60, 492 and 522.

Conformably with the maxim: "The sense of the law, as ascertained in one instance, is applicable in others also, provided there be no impediment."—*Dá. Bhá.*, Chap. III, Sect. ii, Annotation 31.

Remark. "In like manner, in partition about to be made of the grandfather's wealth by the grandsons, the grandmother must be made an equal sharer." (*Dá. Kra. Sang.*, p. 103.) "When partition is made by a father, he must give to such of his wives as have no male issue an equal share with his sons; and when partition is made among sons or grandsons, they must allot to their natural mother or grandmother an equal share with themselves."—(*Coleb.* Dig., Vol. III, p. 27.)—These are the passages of two of the law tracts prevalent in Bengal that

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Annotations.

have a grandson's share. This is conformable to the principle of partition; for in a division between her son and grandsons, she will undoubtedly be entitled to the share of a son.—Cons. H. L., p. 30.

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* See the Annotation at page 520.

† See the whole of page 521.

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speak with perspecuity of the grandmother's right to a share on partition, and from these it also appears to be clear and unquestionable that when the grandfather's property is divided by the sons of his only son, the grandmother is entitled to a share equal to that of any of the grandsons. But when the grandfather's property is divided by such grandsons as are sons of several fathers, and each set of brothers is unequal in number with the sons of each of their uncles, the books do not lay down what should, in that case, be the extent of the grandmother's share—is she to receive a share equal to that of *that* grandson who receives the largest or who receives the smallest portion? For instance, if one son left an only son, another two sons, and a third nine sons, they at first divide *per stirpes*, and then the set composed of two brothers subdivide their joint portion into two shares, and the set composed of nine subdivide their joint share into nine shares: in this case, is the grandmother to get a share equal to that of the single grandson, or that of one of the two, or that of one of the nine grandsons?

Sir Francis Macnaghten says: "If B, C, D, the sons of A, shall have died before partition be made, and each of them have left sons; then upon a partition of these sons of B, C and D, their grandmother (the widow of A,) shall not be entitled to *one-fourth*, as she would have been, had either B, C, or D, been living at the time of partition—but she shall share with grandsons *per capita*, although they will share *per stirpes*. Thus if B shall have left two, C three, and D four, sons,—the estate of A shall be divided into *ten* parts,—of which his widow (the mother of B, C and D) shall take one,—the two sons of B shall take three,—three sons of C shall take three,—and the four sons of D shall take three."—Cons. H. L., pp. 52, 53.

As in the above case the shares of some of the grandsons would be much larger than the portion of the grandmother, and as the law does by no means provide that in a case like the above the share of the grandmother must be equal to that grandson's share who receives the smallest portion, the best living authorities were consulted on the point; and after a mature consideration the conclusion arrived at by them is that the grandmother should get a grandson's share where the grandsons inherit and divide *per capita*, and a son's share where the grandsons inherit *per stirpes* and (originally) divide according to the number of their fathers (sons of the late proprietor.)

The following is the abstract of the written opinion of *Bábu Prasanna Kumár Thákur*, the first of the authorities consulted on the occasion :—

If the sons of a deceased owner all died in his life-time, or having survived their father, all died as joint and undivided owners of an estate left by their deceased father, in either case, on the occasion of partition of such estate by the grandsons, is the grandmother entitled to any, and if so, what share according to

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the Hindu law prevalent in Bengal? The author of the *Dáya-bhága* in Chapter III. Section 2, paragraph 32, states as follows:—

"Wives of the father (meaning step-mothers) who have no male issue, not those who are mothers of sons (must be rendered) equal sharers (with the son.) So VYÁSA ordains: 'Even childless wives of the father are pronounced equal sharers; and so are all the paternal grandmothers: they are declared equal to mothers.' VISHNU likewise says, 'Mothers receive allotments according to the shares of sons; and so do unmarried daughters.'"

The commentators on the above work, perhaps thinking it unnecessary or from oversight, are entirely silent as to the purpose and intent of the passage, *viz.*, 'and so are all the paternal grandmothers: they are declared equal to mothers.'

The Digest of Hindú Law, Book V, Chapter II, page 27, states only on the above point that when partition is made among sons or grandsons, they must allot to their natural mother or grandmother an equal share with themselves.

Here the right of the grandmother to a share on the partition of her husband's estate is clear and positive, but it is not equally clear whether the amount of that share will be equal to the share of the sons or grandsons. The latter take *per stirpes*, *i. e.*, divide among themselves the shares of their respective fathers.

If, following the preceding rules for the construction of the law in question, the *Pandits'* opinion cited by Sir F. Macnaghten be examined with the reason of the law, the fallacy of their dictum will be evident. The *Pandits*, it is supposed, have supported their views by torturing the letter of the law,—as by the passage in the *Dáya-bhága* 'so are all the paternal grandmothers: they are declared equal to mothers.' In the passage of the Digest of Hindú Law,—'To allot to grandmothers an equal share with themselves,' the words 'equal share with themselves,' are construed separatively instead of collectively, so as to mean according to the share of each grandson. If such construction be adopted, it will be liable to the following objections.

The several sons may not have left an equal progeny, *i. e.*, one of them may have left one son and another four sons; and since grandsons succeed to the estate of the grandfather *per stirpes*, and not *per capita*, their shares may be very unequal. For instance, the only son of his father will receive one share, and each of the sons of his uncle will obtain but a fourth of that share. In what proportion then is the grandmother to share in the estate? or with whose share is hers to be co-equal?

Supposing that, to comply with the *Pandits'* construction, the estate of the deceased is divided, according to the number

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of grandsons, into five shares, for the purpose of creating a share for the grandmother, by taking a fifth from each of the grandsons to make up the said share. In this case, as the grandson who is the only son of his father, takes a moiety of the property and gives one-fifth of the fourth (part of his share) as his portion to the said share, each of the other four grandsons who takes but an eighth of the estate, is obliged to contribute in the same proportion, which is an obvious hardship on these—the obligations of all the grandsons being the same, but their contributions very unequal in proportion to the benefits received by them severally.

The grandsons inherit the estate *per stirpes*, but, according to the *Pandits'* construction when the several sons have left an unequal progeny, they contribute to the grandmother's share *per capita*. It is inconsistent with the reason of the law that they should inherit according to one rule, and contribute according to another to the grandmother's share, especially when it is considered that the grandmother's right is on the estate of her husband, and the grandsons inherit it subject to that charge.

The usual rule for the construction of the Hindú law is thus declared by VRIHASPATI :—"A decision must not be made solely by having recourse to the letter of written codes *(Shástra)*; since if no decision were made according to the reason of the law (or according to immemorial usage, for the word *jukti* admits both senses), there might be a failure of justice."

When the reasons laid down in the *Shástra* for the share of the mother and the grandmother, are taken into consideration, there cannot be any other conclusion than that they are respectively entitled to a share equal to that of their sons.

PROSUNNO COOMAR TAGORE.

Remark.

Regarding the great-grandmother's right to a share on partition of the great-grandfather's property, JAGAN-NÁTHA in one place of his Digest (*Vivádа-bhangárnava*) says: "However, there is no reasoning which can show it incumbent on the great-grandsons, and the rest, to allot a share to their great-grandmother. No allotments shall be given to a great-grandmother. Such is the opinion of JÍMÚTA-VÁHANA and the rest;" and in another he affirms: "When property left by the paternal great-grandfather is divided, should not a share be allotted to his wife?—that is admissible from parity of reasoning."

Conclusion.

The latter opinion of the author seems to be consistent with reason; for although the Hindú law does not expressly recognise any right of the great-grandmother upon partition

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made by her great-grandsons and the rest, yet if the mother and grandmother can be entitled to shares on partition of their respective husbands' estates, and when she equally with the grandmother, has been recognised to be one of the enumerated heirs, then it is inconsistent with equity, as well as reason, that she should be deprived of a share on partition of her husband's estate: on the contrary, according to the general maxim—'the sense of the law ascertained in one instance, is applicable in others also, provided there be no impediment,'*—it is proper that she have a share on partition of *her* husband's estate.† It is, however, to be observed, that, her claim to a share arises only when her husband's property is divided by her great-grandsons or any of these and their representatives and not when any other ancestor's estate is partitioned by them.

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* See *ante*, pages 200, 490.

† Unaware of the above maxim and nicety, Sir Francis Macnaghten seems to have made the following remark:—"If the widows, sons, and grandsons shall *all* have died without having come to a partition, and *then* the great-grandsons shall divide the estate among them; their great-grandmother will not be entitled to any share of the estate so partitioned by her great-grandsons; although she would have been entitled to her proportion if her sons, or her grandsons, had divided, or if a son or grandson had been dividing with more remote descendants. Her great-grandsons are *morally* bound to maintain her;—and from what has occurred in the Supreme Court, I venture to say that the performance of this *moral* obligation, may be *legally* enforced."—Cons. H. L., pp. 51, 52.

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CHAPTER VI.

ON ACTS AND POWERS OF DIVIDED AND UNDIVIDED PARCENERS—AND ASCERTAINMENT OF PARTITION.

SECTION I.

ON ACTS AND POWERS OF SEPARATED, AND UNSEPARATED, PARCENERS.

605. The parceners who are divided perform, and are competent to perform, their duties—religious ceremonies and civil acts,—separately from, independently, and even without the consent of, each other. *Vyavasthá.*

Vide Precedents, page 754.

NÁRADA:—When there are many persons sprung from one man, who have duties apart, and transactions apart, and are separate in business, and character, if they be not accordant in affairs, should they give and sell their own shares, they do all as they please, for they are masters of their own wealth.*—*Dá. Bhá.*, Chap. II, § 31. Authority.

606. But according to the doctrine of this (Bengal) school, an undivided parcener,—though incompetent to perform separately the religious *Vyavasthá.*

Annotations.

606. According to the authorities of Hindú law, which prevails in Bengal, a member of an undivided family may give away, or otherwise alien property, to the extent of his own share of the joint wealth: and I conceive his disposal of his property by will would be here maintained, *i. e.*, within the limits of that province, in conformity with JÍMÚTA-VÁHANA's doctrine, that the gift or other alienation, by an unseparated co-heir, may be an immoral act, but is not an invalid one.

Lawyers of Bengal hold that an unfit gift, *(a-deya,)* to which class this of undivided property belongs, is immoral, and even punishable, but not void, nor voidable; while one of the other

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* The *Mádhavíya* which is a commentary on the Institutes of NÁRADA, gives the following interpretation or exposition of the above text:—"If

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ceremonies,*—is competent to perform civil acts, that is to alienate the whole or part of his share in the undivided estate, independently, or without the consent, of the other sharer or sharers of such estate.

Vide Precedents, pages 752—757.

Remark. This difference in doctrines has arisen in consequence of the Bengal school maintaining a several right (*prádeshika-swattwa*) in each co-parcener even before partition, and the other schools recognising no such several right until after partition.

Remark. The authors of the law-books respected in the Benares and other schools maintain that joint property may not be given away by one (parcener), because joint or common property is mentioned in the text of VRIHASPATI ("The prohibition of giving away, is declared to be eightfold: a man shall not give joint property, nor his son, nor his wife, nor a pledge, nor all his wealth, nor a deposit, nor a thing borrowed for use, nor what he has promised to another,") among things unalienable. Moreover, according to the two texts of VYÁSA: *viz.*,—"A single parcener may not, without

Annotations.

class termed void donation, *(a-datta,)* is null, and also punishable.—Colebrooke's opinion.—See Strange's, H. L., Vol. II, pp. 419, 340.

A co-parcener is prohibited from disposing of his share of joint ancestral property; and such an act, where the doctrine of the *Mitákshará* prevails, (which does not recognize any several right until after partition, or the principle of '*factum valet*,') would undoubtedly be illegal and invalid. But according to the *Dáyabhága*, which recognizes this principle, and also a several though unascertained right in each co-parcener, even before partition, a sale or other transfer under such circumstances would be valid and binding, as far as concerned the share of the transferring party.—Macn., H. L., Vol. I, p. 5.

several divided brothers (being) sons of one person, without mutual consent perform sacrifices and acts of piety which are carried out by means of wealth, and also perform agricultural operations which are accomplished by expenditure of wealth, and if also they are possessed of several property, such as mortars and pestles, and if such brothers do not concur in the acts, and if they do any act without regard to them (*i. e.*, the others), if such brothers separated by nature give, sell or receive, they may do so at their will; for they who are separated are masters of their wealth, are independent (*i. e.*,) lords of it. Such is the meaning—page 54.

* See Post, pp. 537—539.

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the consent of the rest, make a sale or gift of the whole immovable estate, nor what is common to the family;" and "Separated kinsmen, as those who are unseparated, are equal in respect of immovables; for one has not the power over the whole, to give, mortgage, or sell it;" a single parcener has not power to make a gift or other alienation.

Remark.

The notion of those (authors) is that a sale or other transfer made by the will of any of the parceners is invalid, since all of them have property in the whole wealth; and a common right to the whole vested in all. But JÍMÚTA-VÁHANA, the founder of the Bengal doctrine, maintains a several right to a part vested in each, and declares the above opinion to be wrong, because there is no proof of it, and citing the above two texts of VYÁSA, he concludes saying: "It should not be alleged that by the texts of VYÁSA, one person has not power to make a sale or other transfer of such property: for here also, as in the case of other goods *(a)*, there equally exists a property consisting in the power of disposal at pleasure;" and adds: "But the texts of VYÁSA exhibiting a prohibition are intended to show a moral offence: since the family is distressed by a sale, gift, or other transfer, which argues a disposition in the person to make an ill use of his power as owner. They are not meant to invalidate the sale or other transfer.*(b)*"*

Accordingly, (since there is not in such a case a nullity of gift or alienation,) NÁRADA says: "When there are many persons sprung from one man, who have duties apart, and transactions apart, and are separate in business and character, if they be not accordant in affairs, should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth *(c)*."*

Such is also the opinion of RAGHU-NANDANA, SRÍ-KRISHNA TARKÁLANKÁRA and the rest.

(a) "As in the case of other goods:"—Meaning goods, which are not common. "Here also:"—In the very instance of land, &c., held in common. "Equally exists:" Intending that there is no distinction of ownership.—*Dá. Kra. Sang.*, Chap. XI, § 4—6.

Conclusion.

Since therefore there is no general property of parceners in the whole estate, it is fallacious to suppose, that a plurality of owners constitutes community, and community must therefore be considered as meaning the state of not being separated. For as property exists in the common property, even before partition, there is nothing to prevent the gift

* *Dá. Bhá.*, Chap. II, § 27, 28, 3.

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or other alienation, by a parcener, of his own share even at that time. This is the opinion entertained by the author of the *Dáya-bhága,* who maintains a partial right to a certain portion (of the estate ascertainable by partition) vested in each individual owner.—*Dá. Kra. Sang.*, Chap. XI, § 4,—7.

(b) The author here imagines an objection to the opinion which he himself entertains, that a gift or other alienation made by an unseparated brother, or co-heir is valid like a transfer made by a father.—RAGHU-NANDANA in the *Dáya-tattwa.* See *Dá. Bhá.*, Chap. II, § 27, Annotation.

(c) By this text of NÁRADA it is shown that in transactions about to be concluded by one parcener, he has the power to give or otherwise dispose of his own share, without the consent of the rest.—*Dá. Kra. Sang.*, Chap. XI, § 7.

Exposition. It should not be said, that this text refers to a state of separation, for since the want of ownership (by one parcener in the portion allotted to another) is in that case clearly determined, the consent of either to the transactions of the other is totally out of the question. Such being the case, the text (of VRIHASPATI above cited) which enumerates common property as not being a subject of donation, must be considered merely in the light of a prohibition, and not as meant to invalidate the transfer. It is thus stated in the *Smriti-sára* and other books.—*Ibid.*, § 8.

Exposition. RAGHU-NANDANA :—In fact, the requiring of the assent of co-heirs, in the case of separated brethren, is for the purpose of ascertaining the fact of partition and settling the limits, like the consent of townsmen and neighbours. Therefore the transfer is valid without the concurrence of separated co-heirs; as has been shown in the *Mitákshará.*—*Dáya-tattwa.*—See *Dá. Bhá.*, Chap. II, § 27, Annotation.

SRÍ-KRISHNA :—Some maintain that a gift cannot be made by one (parcener) of joint property, a prohibition against such transfer being contained in the text (of VRIHASPATI*); and they have further deduced the want of the right of one parcener to make a gift of the whole immovable estate or of what is common to the family from the following texts of VYÁSA.*—*Dá. Kra. Sang.*, Chap. XI, § 1.

Remark. The opinion held by those who maintain the invalidity of a gift or sale (of joint property), at the will of one parcener is grounded on the doctrine, that co-parceners possess a general property in the estates: in fact, that *all* of them have a right to the *whole* estate. This opinion

* Already cited, see *ante*, pages 532, 533.

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is incorrect, for it has been rejected by the author of the *Dáya-bhága*, as unsupported by authority.*

SRÍ-KRISHNA :—Therefore, gift by a parcener of his own share of the common property is valid, whether such gift have been made antecedent or subsequent to partition.—*Dá. Kra. Sang.*, Chap. XI, § 9. Conclusion.

607. While unseparated co-parceners are minors and incapable of giving their consent to an alienation, even one person, who is capable, may conclude a sale and the like, of the joint property (including others' shares,) if a calamity affecting the family require it, or the support of the family render it necessary, or indispensable duties make it unavoidable. *Vyavasthá.*

Vide Precedents, pages 753, 754, 757.

"Even a single individual may conclude a donation, mortgage, or sale of immovable property, during a season of distress, for the sake of the family, and especially for pious purposes."† Authority.

608. But where co-parceners are not incapacitated by minority or the like to give consent, and are not absent, there their consent to an alienation of the joint property, though made for any of the allowable causes as above, is necessary for the validity of the transaction. *Vyavasthá.*

Vide Precedents, pages 753, 754.

For when the right of the eldest or a younger brother, if capable, to take charge of the whole family is pronounced dependant on the will of the rest, as declared by NÁRADA: "Let the eldest brother, by consent, support the rest, like a father; or let a younger brother, who is capable, do so: the prosperity of the family depends on ability,"‡—then the consent of all, who are capable of giving consent, is certainly necessary in an alienation of the joint property though it may be for the behoof of the whole family. Reason.

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* See *ante*, pages 533, 534.

† VYÁSA as cited in the *Vivada-bhangárnava*; and VRIHASPATI as cited in the *Ratnákara*, &c.—*Vide Coleb.* Dig., Vol. II, p. 189, and *Vyav. Chan.*, Vol. I, part i, page 42.

‡ See *Dá. Bá.*, Chap. I, § 37.

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SECTION II.

On ascertainment of Partition.

Vyavasthá. **609. If a doubt arise regarding the fact of a partition having been made, it should be ascertained by the evidence of kinsmen, relatives, or other witnesses, or by written proof, or by separate transaction of business, or separate possession of property.**

Vide Precedents, pages 758—765.

Authority. YÁJNYAVALKYA :—When partition is denied, the fact of it may be ascertained by the evidence of kinsmen, relatives, and witnesses, and by written proof (*a*) ; or by separate possession of house or field.*

Exposition. (*a*) In the first place *kinsmen*, or persons allied by community of funeral oblations, are witnesses. On failure of them, relatives, as signified by the term *bandhu*. In default of these, strangers may be witnesses : for, if they were equally admissible, the specific mention of 'kinsmen' and 'relatives' would be unmeaning ; since they are comprehended under the term 'witnesses.' Hence SHANKHA says:—"Should a doubt arise on the subject of a partition of the wealth of kindred, the family may give evidence, if the matter be not known to the relations sprung from the same race."—*Dá. Bhá.*, Chap. XIV, § 3, 4.

Exposition. (*b*) 'Relations sprung from the same race'—are kinsmen. If the matter be not known to them, the family or relatives may give evidence : but not a stranger (while a person of the family can bear testimony). But if these also be uninformed, any other person may be a witness.—Accordingly, kinsmen are stated by NÁRADA as the chief evidence.—*Ibid.*, § 4, 5.

Authority. Next, the proof is by written evidence : but written proof is superior to oral testimony : being so declared by a text :—"a writing is better than oral evidence."—*Ibid.*, para. 6.

Authority. NÁRADA :—If a question arise among co-heirs in regard to the fact of partition, it must be ascertained by the evidence of kinsmen, by the record of distribution, (*c*) or by the separate transaction of affairs.*

Exposition. (*c*) VRIHASPATI explains the nature of a written record of partition thus : 'that record of partition which brothers or other co-heirs execute after making a just division by mutual consent, is called the written memorial of the distribution.'—*Coleb.* Dig., Vol. III, p. 408.

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* See *Dá. Bhá.*, Chap. XIV, § 1, 2 ;—*Coleb.* Dig., Vol. III, pp. 407—414.

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In the next place, the proof is by the circumstance of separate transaction of affairs, as is stated by*—

NÁRADA.—Gift and acceptance of gift, cattle, grain, house, land, and attendants, must be considered as distinct among separated brethren, and also diet, religious duties, income, and expenditure. Separated, not unseparated, brethren may reciprocally bear testimony, become securities, bestow gifts and accept presents. Those by whom such matters are publicly transacted with their co-heirs, may be known to be separate even without written evidence. The religious duty of unseparated brethren is single. When partition, indeed, has been made, religious duties become separate for each of them.* Authority.

The practice of agriculture or other business pursued apart from the rest, and the observance of the five great sacraments (*d*), and other religious duties performed separately from them, are pronounced by NÁRADA to be tokens of partition.—(*Mitákshará, Sans.*, p. 376.) Authority.

(*d*) The five great sacraments are—"Teaching and studying the scripture is the sacrament of the *Vedas*; offering cakes and water, the sacrament of the *manes*; an oblation to fire, the sacrament of the deities; giving rice and other food to living creatures, the sacrament of spirits; receiving guests with honour, the sacrament of men.—MANU, Chap. III, *v.* 70, Exposition.

VRIHASPATI:—A violent crime, immovable property, deposit, and a previous partition among co-heirs, may be ascertained by presumptive proof, if there be neither writing nor witnesses. The exertion of force, a blow, or the plunder may be evidence of a violent crime; possession of the land may be proof of property; and separate wealth is an argument of partition. They, who have their income, expenditure and wealth, distinct, and have mutual transactions of money-lending and traffic,† are undoubtedly separate.* Authority.

The *Vyavasthá* deduced by JÍMÚTA-VÁHANA from the above authorities is as follows:—

610. One brother gives and another accepts, or they have separate houses and lands, or their income and expenditure (of wealth) and abodes are *Vyavasthá.*

* *Dá Bhá.*, Chap. XIV, § 7, 8.

† Those (co-heirs) whose income, expenses, and wealth are separate, who severally acquire property, and make distinct gifts and separate bailments of their effects, are disunited. Again they who mutually lend money at interest, (who reciprocally give or receive loans,) are disunited.—*Coleb. Dig.*, Vol. III, p. 428.

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separate; or, when loans or other affairs are transacted by one, another is made witness to it, or becomes surety; or they have mutual transactions of money-lending or the like; or one, having bought certain goods from another person, sells it for traffic to his brother: in these and similar instances, since any such act can only take place among divided brethren, a presumption of partition is deduced from it by the intelligent.—*Dá. Bhá.*, Chap. XIV § 9.

Exposition. It is not to be concluded from the use of the plural number in the phrase "by whom such matters are transacted,"* that the concurrence of *all* those circumstances is required. For these texts are founded on reason; and the reason is equally applicable in every several instance.—*Ibid.*, § 10.

Vyavasthá. **611.** By saying, 'if there be neither writing nor witnesses,' it is intimated that presumptive proof is to be admitted only in default of written and oral evidence.—*Ibid.*, § 11.

Remark. JAGAN-NÁTHA considers the distinct preparation of food after an agreement purporting separation a sufficient proof of separation. Some of his observations are as follow—"When it is observed that undivided co-heirs having large families, and perceiving inconvenience in preparing their food together, dress their victuals apart, that separate cookery is merely intended for their own convenience: but preparation of grain for oblations to deities, for the entertainment of guests, (and) for the support of servants, is not in that case separate. In fact, they only are divided co-heirs who dress victuals separately, (and without consulting any other,) for all purposes common (to undivided co-heirs,) for their families, connections, guests, and the like: they only ought to perform separate acts of religion. Hence, although the remainder of an estate may be undivided, it is not considered as proof that partition has not taken place; for it frequently happens that disunited co-heirs have joint property."

Remark. "What then is the meaning of the term 'partition'? This question might be proposed, and is thus answered; for it does mean division of the patrimony, since it would follow, that no partition could take place among those who

* Contained in the text of NÁRADA cited in the preceding page.

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are destitute of inherited wealth. Does it not mean the division of any property whatsoever? Accordingly YÁJNAVALKYA has said: 'One who is able to earn a livelihood, and claims not a share of the joint property, may be disunited from the family, on giving him some trifle, as a consideration to prevent future strife;' and there can be no necessity of separate acts of religion without partition. (It bears not that meaning;) for it might be supposed that no separation could take place between those who have no property whatsoever. Consequently, the meaning of partition in separation in respect of food prepared for the entertainment of guests and relatives, and for other purposes which are common (among united co-heirs). How then can separation take place between those who are not visited by relatives or guests?" *Coleb.* Dig., Vol. III, pp. 420, 421.

612. "Distinct preparation of food, after an agreement in these words—'*hence forward we are disunited*,'—is partition."—*Ibid.*, pp. 420, 421. *Vyavasthá.*

Afterwards their acts of religion, and wealth, and the like, received on some consideration relative to the father, are separate; before that agreement they are single.—*Ibid.*

613. In like manner, the question may be determined by their annual obsequies (for a deceased ancestor) and by their (separate) worship of LAKSHMÍ and other deities, and the like.—*Ibid.*, page 429.

VRIHASPATI says,—"Among coheirs living in commensality, *i. e.* with one dress of food, the worship of *manes*, deities, and *Bráhmanas* takes place in one house only but in a family of divided brethren, the above acts are performed in each house separately."—See *Smri. Chan.*, Chap. XIV, Cl. 6.

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CHAPTER VII.

ON THE DISTRIBUTION OF EFFECTS CONCEALED OR WITHHELD FROM PARTITION, &c,—PARTICIPATION OF THE SON OR SONS BORN AFTER PARTITION—RE-UNION—PARTICIPATION OF THE HEIR COMING AFTER PARTITION.

SECTION I.

ON THE DISTRIBUTION OF EFFECTS CONCEALED OR WITHHELD FROM PARTITION.

Vyavasthá. **614.** After partition of the common estate, if any part thereof be discovered to have been concealed, or anyhow withheld, from partition, or to have remained undivided, the same must be divided among the brethren in proportion to their respective shares.*

Vide Precedents, page 766.

Authority. MANU:—When all the debts and wealth have been justly distributed according to law (*b*), anything which may be afterwards discovered shall be subject to an equal distribution (*a*).*

Authority. KÁTYÁYANA.—A house, arable land, or quadrupeds, discovered (after partition) must be divided: if it be justly suspected that effects are concealed, a discovery by ordeal is prescribed by law. Thus MANU declared, that household utensils, beasts of burden, or milch cattle, ornaments, and slaves, must be divided when discovered (among the heirs); and that if effects be suspected to be hidden, a discovery must be obtained by *kosha.**

Explanation. (*a.*) 'Shall be subject to an equal distribution'—that is the division of it should be precisely similar to that which had been previously made; and a less share is not to be given, nor no share, to the person who concealed the property as a punishment for his concealment.*

It is therefore determined, that the division of the concealed property must be made with the person who concealed it.*

Explanation. (*b*) 'According to law'—that is, if the distribution were illegal, a second partition must be made, even though concealment be not alleged; but if the distribution had been made

* *Dá.-Bhá.*, Chap. XIII, § 1, 2. *Dá. Kra. Sang.*, Chap. VIII, § 1, 2, 5 *Coleb.* Dig Vol. III. pp. 395—406.

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according to law, no second partition shall be granted unless effects were secreted.* Consequently,—

615. Effects ill-distributed must be again divided according to law.* *Vyavasthá.*

KÁTYAYANA.—Effects, which are withheld by them from each other, and property which has been ill-distributed *(c)* being subsequently discovered *(d)* let them divide in equal shares: so BHRIGU has ordained.* Authority.

(c) "The property which has been ill-distributed:"—intending, that property of which a distribution has been made contrary to law, through error and the like, must be again divided according to law,—for that part of the text of MANU, which declares: "once is the partition of the inheritance made, &c." is intended to forbid a partition after the first has been *legally* made.* Explanation.

(d) 'Subsequently discovered.'—By this it is shown, that partition is to take place of the concealed effects alone, and not that a second partition is to be made of what has already been once divided.* Explanation.

On a subsequent discovery, there must be an equal division of what is restored: hence it appears, that a distribution of that only shall be made; what had been already distributed shall not be again divided. An equal partition is (mentioned) to remove the doubt, whether no share, or a less allotment, shall be given to the concealer because he had secreted the effects.—RAGHU-NANDANA. See *Coleb.* Dig., Vol. III, p. 400. Exposition.

YÁJNAVALKYA:—Effects, which have been withheld by one co-heir from another, and which are discovered by the divided co-heirs, let them again divide in equal shares: this is a settled rule.* Authority.

Partition being suggested as a matter of course, it is intimated by the enunciation of this text, that the crime of theft is not committed by concealing effects held in co-parcenary. So HALÁYUDHA, VISHWA-RÚPA, CHANDESHWARA, JÍMÚTA-VÁHANA, RAGHU-NANDANA, and the rest.—*Coleb.* Dig., Vol. III, p. 397. Exposition.

616. Not only a brother, but on his death his male issue as far as the great-grandson, is also entitled to share such property. *Vyavasthá.*

KÁTYÁYANA:—What has been concealed by one of the co-heirs, and is afterwards discovered, let the sons, if the father be deceased, divide equally with their brethren.* Authority.

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* *Vide Dá.-bhá.*, Chap. XIV, § 3—5. *Coleb.* Dig., Vol. III, pp. 395—399, 406; and *Dá. Kra. Sang.*, Chap. VIII, § 2, 3.

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Explanation. The meaning of the text is, that in default of a co-heir, let his male issue as far as the great-grandson (in the male line) equally divide the concealed property with the other sharers, (*i. e.*,) the brothers of the deceased.—SRI-KRISHNA'S Commentary on the *Dáya-bhága, Sans.*, p. 247.

Authority. KÁTYÁYANA:—If the parceners have secreted part of the property from each other, or if any mistake has been made in the partition, on a subsequent discovery, there must be an equal division of what has been restored, (or ill-distributed).—*Vi. Chi.* 241.

Illustration. "If any mistake has been made;" for example, if more have been given to one *than to another*, by mistake, or *with intention* to defraud the other co-heir, then should the excess be subsequently ascertained, lots shall again be cast; but not upon the simple allegation of an unfair distribution. *Coleb.* Dig., Vol. III, p. 399. Nevertheless,—

Vyavasthá. **617. The partition which was made legally and unmistakably, and was consented to by the parties concerned, could not be revoked at the instance of any of them, who must be compelled by the ruling power to abide by their respective shares.***

Authority. If the distribution were illegal, a second partition must be made, even though concealment be not alleged; but if the distribution had been made according to law, no second partition shall be granted unless effects were secreted.—*Coleb.* Dig., Vol. III, p. 397.

Remark. The (following) text of MANU must be considered as relating to partition made according to law.—*Ibid.*, p. 399.

Authority. MANU—Once is the partition of an inheritance made; once is a damsel given in marriage; and once does a man say, "I give": these three are, by good men, done once for all, and irrevocably.—*Coleb.* Dig., Vol. III, p. 218.

The maxim "Once is the partition of an inheritance made," relates to the case of a fair distribution.—*Dá.-bhá.*, Chap. XIV, § 5.

Authority. VRIHASPATI:—"Whatever share is enjoyed by each, let not that be contested; if he subsequently dispute a distribution, which was made with his own consent, he shall

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* *Vide Dá.-bhá.*, Chap. XIII, § 4, 5; and *Coleb.* Dig., Vol. III, pp. 397—402.

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be compelled by the king to abide by his share, or be amerced if he persist in contention."—*Coleb.* Dig., Vol. III, p. 399. See *Vyav. Mayú.* Chap. IV, Sect. vii, § 38.

618. "Effects which have been taken (*e*) by a kinsman, he shall not be compelled by violence to restore; and the consumption of unseparated kinsmen, they shall not be required to make good"—KÁTYÁYANA. *Vyavasthá.*

By gentle means, not by violence, a kinsman shall not be made to restore the effects taken by him. But what has been consumed by a co-heir during co-parcenary over and above his due proportion, he shall not be required to make good.—*Dá.-bhá.*, Chap. XIV, § 7. Exposition.

(*e*) "Effects which a kinsman has concealed (*i. e.*, taken);" joint property embezzled by him: this term is here secondary, for the case does not fall within the definition. Theft is the taking possession of a thing which appertains *solely* to another; but these effects do not *solely* belong to another person. He shall be made to restore them by mild expostulation and similar means, not by violence. RAGHU-NANDANA.—*Coleb.* Dig., Vol. III, pp. 401, 402.

"Nor let a co-heir be obliged to make good what he has expended;" what he has consumed more than his co-heirs, before partition, he shall not be compelled to make good. JÍMÚTA-VÁHANA, RAGHU-NANDANA and others.—*Ibid.*, p. 402.

It may be asked if he restore them not after friendly expostulation or the like, may the co-heir use compulsion or not? It should not be argued from the words of the legislature—"let not a co-heir use violence to make him restore,"—that it shall not (even then) be used.—*Ibid.*,

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SECTION II.

PARTICIPATION OF THE SON OR SONS BORN AFTER PARTITION.

The son who, at the time of partition, was in the womb, is of two kinds, namely, the one whose conception was known at the time of partition, and the other whose conception was not known at that time.

619. If the father, having separated his sons, and having reserved for himself a share according to law (*a*), die without being re-united with his *Vyavasthá.*

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sons; then a son, who is begotten after the partition, shall alone take the father's wealth, and liabilities, if any.*

Authority. Thus GOUTAMA:—A son, begotten after partition (*b*), takes exclusively the wealth of his father.*

Exposition. (*a*) By the term 'according to law' it is thus hinted that, if the father, through ignorance of the law, have made a partition in which he took a very small share for himself, his son, afterwards begotten, shall receive a due allotment from the brethren. SRÍ-KRISHNA's Commentary on the *Dáya-bhága.*, *Sans.* p. 147.

Exposition. (*b*) He, of whom the conception was subsequent to the division of the estate, is a son begotten after partition; being procreated by a person, who is separated (from co-parceners): for, without conception there is no procreation.*

Vyavasthá. **620.** Not one only, but even many sons, begotten after a partition, shall take exclusively the paternal wealth.*

Authority. VRIHASPATI:—The after-born (*c*) brothers of those, who have made a partition with their father, whether children of the same mother or of other wives, shall take their father's share.*

Exposition. (*c*) 'After-born'—that is, begotten by the father after partition.—SRÍ-KRISHNA's Commentary on the *Dáya-bhága*, *Sans.*, page 147.

Vyavasthá. **621.** But, if the father die after re-uniting himself with some of his sons, then the son begotten after partition shall receive his share from the re-united co-heirs.*

Authority. MANU and NÁRADA:—A son, born after a division, shall alone take the paternal wealth; or he shall participate with such (of the brethren) as are re-united (with the father.)

One, born previously to the partition, is not entitled to the paternal estate: nor one begotten by the separated father to the estate of his divided brother: so the same author.*

Authority. VRIHASPATI:—All (*d*) the wealth, which is acquired by the father himself (*e*), who has made a partition with his sons goes to the son begotten by him after the partition.

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* *Dá.-bhá.*, Chap. VII, § 2—5.—See *Coleb.* Dig, Vol. III, pp. 434—448.

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Under the term "all"—wealth, however considerable, which is acquired by the father (*d*), goes to the son begotten by him after partition.* Exposition.

(*d*) 'Which is acquired by the father.'—It is thus intimated that what is acquired, through personal labour, with a separate fund, by the father who united after partition with another son, belongs also to the son begotten after partition, and not to the re-united parceners.—SRÍ-KRISHNA'S Commentary on the *Dáya-bhága. Sans.*, p. 148. Explanation.

VRIHASPATI:—A son, born before partition, has no claim on the wealth of his parents; nor one, begotten after it, on that of his brother.*(*e*) Authority.

VRIHASPATI further declares:—Those born before it are declared to have no right, as in the wealth, so in the debts likewise, and in gifts, pledges, and purchases.*(*e*) Authority.

(*e*) The meaning is, that, as the son begotten after partition is to receive the property of his father, acquired *after* partition, so also he is to liquidate his father's debts contracted *after* partition. In like manner, whatever the father had promised to give, whatever he had deposited, mortgaged, or whatever price he did not pay after purchasing (a thing), all these should be performed by him only.—SRÍ-KRISHNA'S Commentary on the *Dáya-bhága, Sans.*, p. 149. Explanation.

Again VRIHASPATI:—They have no claims on each other except for acts of mourning and libations of water.*(*f*) Authority.

(*f*) By specifying 'acts of mourning and libations of water' only, the author excludes the pretensions to a participation in wealth.* Exposition.

If a man, having made a partition with his sons, and again residing with any one of them as a re-united parcener, die after begetting another son, this last born child shall be sole heir of his estate.—*Coleb.* Dig., Vol. III, p. 553. Authority.

622. The son who was conceived *before* partition between his father and brothers, but whose fœtal existence was not known at that time, is to have his share from his brothers, who must make up the same by contributing something from the share of each of themselves.* *Vyavasthá.*

* See *Dá. Bhá.*, Chap. VII, § 5, 6, 7, 8, 9.—*Coleb.* Dig., Vol. III., pp. 437—440, and SRI-KRISHNA'S Commentary on the *Dáya-bhága, Sans.*, pp. 147, 148.

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Authority. VISHNU:—Sons with whom the father has made a partition, should give a share to the son born after the distribution.—*Dá. Bhá.*, Chap. VII, § 11.

Vyavasthá. **623.** But if the father be dead, then the shares of him and of the brethren must be thrown together, and divided, according to law, by all the brothers.*

Vyavasthá. **624.** If, however, a share were previously set apart for the child in the womb, the wife's pregnancy being known, then all shall participate in the father's allotment (after his demise), provided there be no son begotten after the partition.*

Exposition. VISHNU and YÁJNAVALKYA have directed, that an allotment shall be received (by the son born after partition) from his brothers; MANU, VRIHASPATI, and GOUTAMA have ordained, that the son born after partition shall not receive it from them. On this seeming contradiction, the author of the *Prakásha*, CHANDESHWARA, MISRA, and SHÚLA-PÁNI remark: 'if the pregnancy was not certainly known at the time of the distribution, in that case, (should a son, who was then in the womb, be born after it,) he shall obtain his share from the brothers; but a son begotten subsequently to the partition shall only obtain the estate of his father.' But if the pregnancy be manifest, no partition can be made; so the author of the *Prakásha*, and CHANDESHWARA. Yet, if the co-heirs cannot wait so long a time, one share ought to be set apart for the child, as directed by VASHISHTHA (in the case of pregnant widows). (See *ante*, p. 3.) But should a daughter be produced from that conception, the share (which had been set apart) shall be subsequently distributed among them (brothers.)*

Vyavasthá. **625.** But, if the father himself, though apprised of the pregnancy, have given shares to his sons, in virtue of his power as owner; the child in the womb has no right to participate, since their property in those shares is complete: he has a right only to the father's allotment; and, if there be a son begotten after the partition, he is entitled to partake equally with him.—SRÍ-KRISHNA'S Commentary on the *Dáya-bhága*, *Sans.*, pp. 147, 148.

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* See *Coleb.* Dig., Vol. III, pp. 437—440; and SRÍ-KRISHNA'S Commentary on the *Dáya-bhága*, *Sans.*, pp. 147, 148.

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This is applicable only to the case of wealth acquired by the father.—*Dá. Bhá.*, Chap. VII, § 10. Remark.

626. But, if property inherited from the grandfather, as land or the like (*g*), had been divided, he may take a share of such property from his brothers.—*Ibid.* *Vyavasthá.*

For, partition of it is authorized (only) when the mother becomes incapable of bearing more children.—*Ibid.* Reason.

VISHNU:—Sons, with whom the father has made a partition, should give a share to the son born after the distribution.—*Ibid.*, § 11. Authority.

Since it disagrees with the ordinances (of MANU and NÁRADA), that 'he shall alone take the paternal wealth,' it must relate to the hereditary property, for the reason above mentioned (*h*).—*Ibid.*, § 13. Explanation.

(*g*) The term 'land or the like' comprehends corrody and the bipeds.—SRÍ-KRISHNA'S Commentary on the *Dáya-bhága*, *Sans.*, *p.* 149.

(*h*) '*For the reason above mentioned*]—That which was stated; because the distribution is authorized when the mother becomes incapable, &c. Therefore whether pregnancy were known or not, the partition being illegal, which has been made, of the grandfather's estate, without the mother's being incapable of bearing children, it ought to be annulled; and the two cited passages will relate to the distribution of such property: but the preceding texts of MANU and the rest regard the father's own acquired wealth. The contrary must not be supposed.—SRÍ-KRISHNA'S Commentary on the *Dáya-bhága*, *Sans.*, p. 149. Expositon.

A question may be here proposed for disquisition: if a man surviving his resignation of worldly concerns, and urged by his fate, co-habit with his wife and beget a son after his property has been divided among his children, what would be the consequence? It is answered: the father's property being divested by abdication, which is a virtual gift, and the property being vested in his sons without any effort on their part, how can a child born afterwards have any claim thereon, whether it be or be not divided, since it does not belong to his father—*Coleb*, Dig., Vol. III, p. 52. Remark.

627. Should the mother be pregnant, but not known to be so, at the time of partition made by *Vyavasthá.*

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brothers after the death of their father, and should a son be subsequently born of that pregnancy, he shall take his share from his brothers.

Vyavasthá. **628.** But if the father die while the mother was pregnant, and known to be so, and then if the brothers divide the estate without waiting for the birth of the child, and without setting apart a share for it, such partition is illegal, and the issue of that pregnancy, if a son, shall take his share by having the partition cancelled.

Vyavasthá. **629.** The son born after partition shall, however, receive a share of the then existing estate, exclusive of the income and expenditure.*

Authority. YÁJNAVALKYA:—When the sons have been separated, one, afterwards born of a woman equal in class, shares in the distribution. His allotment must positively be made, out of the visible estate corrected *(i)* for income and expenditure.*

Explanation. *(i)* '*Must positively*']—The particle '*Vá*' is affirmative; and what has been consumed, is consequently excepted.—SRÍKRISHA's Commentary on the *Dáya-bhága, Sans.*, p. 149.

That is, without including the subsequent increase, or what has been consumed by the brethren.—*Coleb.* Dig., Vol. III, p. 436.

SECTION III.

ON RE-UNION OF PARCENERS AFTER PARTITION.

ARTICLE I.

WHAT IS RE-UNION, HOW AND WITH WHOM IT IS EFFECTED.

630. Re-union is not only the living jointly of the parceners already divided, but also the mixing together of their divided shares, and

* See *Dá. Bha.*, Chap. VII, § 12.

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possessing them jointly upon the agreement or understanding that what belongs to one of them belongs also to the other or others of them.

Vide Precedents, pages 768, 769.

Authority.

VRIHASPATI :—He, who being once separated, again, through affection, dwells together (*a*) with his father, brother, or paternal uncle (*b*), is termed re-united.*

Explanation.

(a) Their *dwelling together* is not simply a residence in the same house or abode, (for that may happen even without affection, when the habitations are not equally numerous with the brothers ;) but it consists in forming one household ; and their intentions are thus declared : "what is thy property is mine"—their effects are thus intermixed : "the duties of us both shall be the same"—an agreement for community of duties is thus made : in like manner common fare. Consequently, two brothers, again living together, through mutual affection, as joint house-keepers, after having made a partition, are called re-united parceners. Such is the meaning, and the text is so interpreted by RAGHU-NANDANA, JÍMÚTA-VÁHANA, VÁCHASPATI MISRA, and the rest.—*Coleb.* Dig., Vol. III, p. 512.

Exposition and Authority

He (VRIHASPATI) thus shows, that persons, who by birth have common rights in the estate acquired by the father and grandfather, as father (and son,) brothers, uncle (and nephew,) are re-united, when, after having made a partition, they live together, through mutual affection, as inhabitants of the same house, annulling the previous partition, and stipulating that "the property which is thine, is mine, and that which is mine is thine." The partnership of traders, who are not so circumstanced, and only act in concert on a united capital, is no re-union. Nor are separated co-heirs *re-united* merely by junction of stock, without an agreement prompted by affection as above stated.—*Dá. Bhá.*, Chap. XI, Sect. i, para. 30.

Re-united parceners defined.

It appears, however, from the term—"With his father brother, or paternal uncle," used in the text of VRIHASPATI that they alone are determinately meant, who were not separate by birth. Of these, the father is first mentioned, as the distributer of the estate, when it is divided in his life-time : the term, taken comprehensively, includes also the paternal grandfather and great-grandfather ; the brother is next mentioned, as the distributer of shares among brothers ; and lastly, the paternal uncle is named, as the person who distributes an estate shared with a son's son, whose own father

* *Dá. Bhá.*, Ch. XII, Sect. I, para. 3.—*Dá. Ta.*, Chap. XII, § 40.—*Coleb.* Dig., Vol. III. p. 512.

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is dead : the term, taken comprehensively, includes the son and grandson of a paternal uncle, the great uncle and others. The wife of a brother and the rest are not meant to be so, because they are subject to the control of their husbands and so forth. Among those only does re-union take place; not among others.—*Coleb.* Dig., Vol. III, pp. 513, 514.

Re-untide parceners defined.

Who can be called a *re-united parcener?* To this JÍMÚTA-VÁHANA says:—"Father, son, brothers, paternal uncles, and the rest, are, when re-united, reckoned *re-united* parceners (*Dá.-bhá.*, Chap. XI, Sect. i, § 30.) With reference to the term "and the rest" SRÍ-KRISHNA TARKÁLANKÁRA has shown re-union among persons as far as the brother's grandson. (*See* his Commentary on the *Dáya-bhága, Sans.*, pp. 224, 225.) RAGHU-NANDANA affirms, that re-union only takes place between father and son, between brothers, or between paternal uncle and nephew. In effect he considers the term, "and the rest," in the remark of JÍMÚTA-VÁHANA, as comprehending only the son and nephew. JÍMÚTA-VÁHANA again observes, when treating of the shares of re-united parceners,* "re-union should not be admitted among others besides those who are expressly mentioned, else the enumeration would be unmeaning.†" Hence—

Vyavasthá.

631. Re-union can be made by the above mentioned parties or some of them who made the (first) partition, but not by their heirs and the rest.*

Vide Precedents, page 770.

Vyavasthá.

632. It has been determined that, if one, out of several brothers (or co-parceners,) be separated from the rest, it is a virtual separation of all; and although the remaining brothers still continue joint, they are considered to have become re-united.

Vide Precedents, page 773.

Reason.

Because, the separated brother or co-parcener could not have his share unless the *shares* of the other brothers or co-parceners were apportioned and allotted, so, if after this the latter lived together, they must be considered to be re-united after partition.‡

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* See *Dá. Bhá.*, Chap. XII, § 3, 4, and SRI-KRISHNA'S Commentary on the *Dáya-bhága, Sans.*, p. 245.

† *Coleb.* Dig., Vol. III, p. 514.

‡ It has, however, been determined by the High Court at Madras that 'where a division has taken place amonst the members of a Hindú family, one of whom is a minor, the circumstance that the father and the minor continue to live together, and their shares become united does not conclusively constitute a state of re-union between the father and the minor, but is evidentiary matter only to prove the re-union.'—Mad. H. C. Rep., Vol. II, page 235.

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ARTICLE II.

PARTITION AMONG RE-UNITED PARCENERS.

633. If the co-heirs being once divided and living again together, make a second partition of their re-united property, then, there existing no right of primogeniture, none of the parceners is entitled to a larger share than the rest.* *Vyavasthá.*

So MANU AND VISHNU:—If brethren once divided, and living again together, as co-parceners, make a second partition, the share must, in that case, be equal. There is not, in this instance, any right of primogeniture. (*b*)* Authority.

So also VRIHASPATI:—If brothers, who have made a partition, become, through a mutual affection, re-united, and *again* make partition of their joint property, the first-born has no right to a larger portion.* Authority.

(*b*) From the expression "There is no right of primogeniture" it is deducible that in the partition after re-union, as the eldest brother has no right to a deduction in addition to his share, so a father has no title to a double share or the like.—Consequently,— Exposition.

634. The rule of distribution must conform with the original allotment of the shares and follow the previous proportions.† *Vyavasthá.*

The meaning of the phrase—"The distribution must conform with the original allotment and follow the proportions before ordained,"—is, that the division shall be made in that proportion and mode which were observed in the first instance; for this is no less a partition (than the former distribution was).—*Coleb.* Dig., Vol. III, p. 550. Explanation.

635. When a man, re-uniting with his brother, dies leaving no son born after the re-union, but leaving a son, grandson or great-grandson in the male line separated before the re-union, such issue will succeed to his share or property in preference to the re-united brother. *Vyavasthá.*

Inasmuch as the son is the self-same as the father, and the term son extends to the great-grandson (in the male line). See *ante*, page 501. Reason.

* See *Dá. Bhá.*, Chap. XII, § 1—3; *Dá. Ta.*, Chap. XI, § 40; and *Coleb.* Dig., Vol. III, pp, 513—517.

† See *Coleb.* Dig., Vol, III, p. 550, and *Vyavasthá-chandriká*, Vol. II, Part i, page 400.

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Here this is the refined sense: "A son, whether re-united with his father, or not re-united, shall obtain the entire paternal share, since the power of intercepting the right to take a share lies in the filial relation. Among (several) sons also, when one is re-united, and the other is not, the re-united one alone (succeeds) by the text,—'Of a re-united (co-heir), the re-united (co-heir.)'"*—*Vyav. Mayú.*, Chap. IV, Sect. ix, § 16.

In default of male issue down to the great-grandson in the male line, the following are the general and special rules of succession to the estate of a deceased owner re-united.

Vyavasthá. **636.** Where there is competition between claimants equal in point of relationship, there the inheritance devolves on the person or persons re-united to the exclusion of those not re-united; but where the competition is among persons unequal in the *degree* of affinity with the deceased owner, *there* no preference is given to re-union, but the person nearer in relationship or superior in the degree of affinity inherits to the exclusion of the rest.† Consequently,—

Vide Precedents, pages 768—776.

Authority. The text, "A re-united (brother) shall keep the share of his re-united co-heir," is indeed to provide a special rule governed by the circumstance of re-union after separation, and applicable to the case where a number of claimants in an equal degree of affinity occurs.—*Dá. Bhá.*, Chap. XI, Sect. vi, para. 38.

Exposition. Hence, if there be competition between claimants of equal degree, whether brothers of the whole blood, or brothers of the half blood, or sons of such brothers, or uncles, or the like, the re-united parceners shall take the heritage: for the text does not specify the particular relation; and all these relations, were premised in the preceding text;‡ and a question arises in regard to all of them. Therefore the text must be considered as not relating exclusively to brothers. *Ibid.*, § 39.

* Of YÁJNAVALKYA. The whole of this text runs thus. "As of a re-united (co-heir), so of the uterine brother, the uterine brother."—*Vyav. Mayú.*, Chap. IV, Sect. ix, § 5.

† *Vide Dá. Bhá.*, Chap. XI, Sect. v, § 36—39.

‡ Of YÁJNAVALKYA. See *ante*, page 29.

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637. In default of descendants down to the son's grandson in the male line, the re-united whole brother inherits to the exclusion of the whole as well as half brothers not re-united. *Vyavasthá.*

638. Where there are brothers of the whole blood and half blood, and both re-united with the deceased owner, there also the re-united whole brother succeeds to the exclusion of the re-united half brother. *Vyavasthá.*

639. If, however, there is a step-brother re-united and a whole brother not re-united, then they inherit simultaneously as well as equally. *Vyavasthá.*

Annotations.

637. Where, among the rest of the brethren, there are certain uterine brothers re-united and certain uterine brothers not re-united, those uterine brothers that are re-united shall alone divide the property amongst them. NÁRADA recites the text, "Among brothers, if any one die without issue, &c.," after having declared, "The wealth of a re-united goes to the re-united only."—*Smri. Chan.*, Chap. XII, Clause 12.

638. The sense of the first quarter [of the whole text]: "Of a re-united [co-heir,] the re-united [co-heir,"] has an exception in the second [quarter,] "of the uterine brother," with which the other is connected. The meaning, therefore, is that, in a case embracing both whole and half-brothers, all re-united together, only the re-united whole brother will take the wealth of the re-united brother, deceased.—*Vyav. Mayú.*, Chap. IV, Sect. ix, § 8.

638. Thus, if there be brothers of the whole blood, and half blood, the uterine (or whole) brother, being a re-united parcener, not a half brother who is so, takes the estate of the re-united uterine brother. This is an exception to what has been before said.—*Mit.* Inh., Chap. II, Sect. ix, § 6.

639. Next, in the answer to the inquiry, who shall take the succession, when a re-united parcener dies leaving no male issue, and there exists a whole brother not re-united, as well as a half brother who was associated with the deceased, the author (YÁJNAVALKYA) delivers a reason why both shall take and divide the estate: "A half brother, being again associated, may take the succession, not a half brother though not re-united; but one, united [by blood, though not by co-parcenary,] may obtain the property; and not [exclusively] the son of a different mother."—*Vide Mit.*, Inh., Chap. II, Sect. ix, § 7.

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Vyavasthá. **640.** If there are only half brothers re-united and not re-united, then the re-united half brother succeeds to the exclusion of the half brother not re-united.

Authority. If there are two brothers, the one uterine, and the other a half brother, and both were unassociated with the deceased owner, the uterine brother exclusively takes the wealth of his uterine brother in conformity with the text: "An uterine brother shall thus retain or deliver the share of his uterine relation."—Where an associated half brother, and unassociated whole brother are the competitors, for the succession, it devolves equally on both of them in conformity with the text "A half brother being again associated may take the succession."—Where uterine and half brothers compete, and both were associated with the deceased, the associated whole brother exclusively takes the inheritance, for in this case, he possesses a double title (namely, his being uterine, and also associated,) in conformity with the text,—"A re-united brother shall keep the share of his re-united (co-heir), who is deceased.—*Dá. Kra. Sang.*, Chap. I, Sect. viii, § 3—5.

Vyavasthá. **641.** The conclusion of all this is, that,—1, in the case of only whole brothers re-united and unre-united, the former succeed;—2, similarly, in the case of only half brothers re-united and unre-united, those re-united take the inheritance;—3, in the case of a half brother re-united and a whole brother separated, they divide the heritage be-

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Annotations.

639. YÁJNAVALKYA speaks of cases where the step-brothers are re-united and uterine brothers live separated. Re-united step-brothers, but not brothers who live separated, shall take each other's property. A uterine brother, even when he is separated, shall have the property. But a separated step-brother cannot get it.—*Vi. Chi.*, p. 306.

It may be said that the re-union of step brothers, and the birth of uterine brothers from the same womb, are the source of their right of inheritance.—*Ibid.*

637—640. In default of father and mother, brothers inherit; first, the uterine associated brethren; next the unassociated brethren of the whole blood; thirdly, associated brethren of the half-blood; and, fourthly, the unassociated brethren of the half-blood. The above order supposes that the deceased had only

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tween them ;—4, in any other case of competition between the whole and half brothers, the latter is excluded, that is to say, a half brother succeeds simultaneously with a whole brother *only* in the case of his being re-united and the latter not re-united. In all other cases the whole brother succeeds in preference to the half brother.

Vide Precedents, pages 768—773, 775, 776.

Vyavasthá.

642. The same order of succession must likewise be observed in the case of nephews of the whole and nephews of the half blood.—*Dá. Kra. Sang.*, Chap. I, Sect. viii, § 6.

Vyavasthá.

643. The other particular rules (*c*), which have been set forth under the head of partition among brothers, must be observed in this case also.—*Dá. Bhá.*, Chap. XII. § 5.

Explanation.

(*c*) "The other particular rules"—that is, wealth acquired without the use of the joint stock, belongs to the acquirer exclusively, and is not shared by the rest; but in the instance of the gains of science, such of the brethren as are equally or more learned participate, and in the case of the wealth acquired with the use of the joint stock, all partake. These and other special rules, set forth under the head of partition among brethren, must be observed also in the case of partition after re-union.*—SRÍ-KRISHNA'S Commentary on the *Dáya-bhága*, *Sans.*, p. 245.

Exposition.

So also RAGHU-NANDANA, who says, "But if any one of the re united brethren acquires property by means of science, heroism and the like, two shares should be allotted to him, and the rest shall take equal shares.—*Dá. Ta.*, Chap. XI, § 40.

Exposition.

These have been partly stated in another place by JÍMÚTA-VÁHANA himself, thus: "Moreover the text of KÁTYÁYANA (is similarly founded on reason.) 'When brethren separated

Annotation.

uterine or only half brothers, and that they were either all united or all separated. But if a man dies leaving a uterine brother separated, and a half brother associated or re-united, these two will inherit the property in equal shares. Sisters are not enumerated in the order of heirs.—Macn., H. L., Vol. I, p. 26.

* *Dá. Bhá.*, Chap. XII, § 5, Annotation.

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in regard to the patrimony, and subsequently living anew together, make a (second) partition, he from whom an acquisition has proceeded, shall again take a double share.' This is expounded by SRÍKARA as signifying that 'a re-united parcener, who has made an acquisition with the use of the joint stock, shall have two shares; and the rest one a piece.' Hence it appears to be the opinion both of the saint and Commentator, that wealth, gained with no use of the common funds, appertains exclusively to the acquirer, even in the instance of a re-union of parceners; and such wealth is not joint stock."—*Dá. Bhá.*, Chap. VI, Sect. i, § 24—26.

SECTION IV.

ON THE ALLOTMENT OF A SHARE TO A CO-PARCENER APPEARING AFTER PARTITION.

Vyavasthá.

644. Whether partition have or have not been made, whenever an heir appears, he shall receive a share of whatever common property there is. Be it a debt, or a writing, or a house, or field, which descended from his paternal ancestor, he shall take his due share of it, when he comes, even though he have been long absent. VRIHASPATI.—See *Dá. Bhá.*, Chap. VIII, § 1.

Vyavasthá.

645. Not only he, but his descendants also shall take his share.—See *Dá. Kra. Sang.*, Chap. IX, § 4, 5.

There is, however, the following distinction in the participation of descendants.

Vyavasthá.

646. It is a settled point, that one who travelled into a foreign country (*a*), at a period when no partition had taken place, and returned after a long lapse of time, as well as his descendants, as far as the seventh in degree, after they shall have made themselves recognized by the inhabitants, whose family from generation to generation resided in that country, and neighbours, shall obtain a lawful share of the heritable wealth.—*Dá. Kra. Sang.*, Chap. IX, § 9.

Vide Precedents, page 776.

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VRIHASPATI :—If a man leave the common family and reside in another country (*a*), his share must, no doubt, be given to his male descendants when they return. Be the descendant third, or fifth, or even seventh (*b*), in degree, he shall receive his hereditary allotment, on proof of his birth and name.—To the lineal descendants, when they appear, of that man, whom the neighbours and old inhabitants know by tradition to be the proprietor, the land must be surrendered by his kinsmen.—See *Dá. Bhá.*, Chap. VIII, § 2, 3. Authority.

(a) A different country is thus defined by VRIHAT MANU: "Where language differs or a mountain or great river intervenes, it is called a different country. However near, a country, which has a different name and is parted by a river, is called a different country by the SELF-EXISTENT himself: and so is the place whence intelligence cannot be received in ten nights." VRIHASPATI says: "some call a space of sixty *yojanas* or *jojanas** a distinct country, some the space of forty *jojanas*, others again the space of thirty *jojanas*." The discrepancies regarding language, &c., as in the texts of the two sages, are thus reconciled: if three circumstances (of difference) exist, the country is distinct (*even*) within thirty *jojanas*; if two exist, it is a different country beyond thirty and (*even*) within forty *jojanas*, and where but one exists, it is a different country beyond forty *jojanas* and (*even*) within sixty. A region beyond sixty *jojanas* is a foreign country, though it may not have a different language, or may not be intervened by a mountain or great river. Thus *Shudhi-Chintá-mani.*—See *Udváha-tattwa.* A different country defined.

(*b*) *Or even seventh.*] The particle or (*vá*) connects this with other degrees not mentioned but included within the seventh. Therefore, descendants as far as the seventh in degree, returning from a foreign country, participate: not so the eighth or other remoter descendants. Accordingly, the text, which expresses that, "The right to participation ceases with the seventh person," relates to this subject.—SRÍ-KRISHNA'S Commentary on the *Dáya.-bhága.*, *Sans.*, p. 150. Exposition.

647. But descendants only, as far as the fourth degree, of one who had remained all along in his own country, are entitled to share his wealth.—*Dá. Kra. Sang.* Chap. IX, § 11. *Vyavasthá*

Vide Precedents, page 776.

For it has been formerly declared, that the fifth in descent and the rest confer no benefits on a deceased owner; since they are not competent to present funeral oblations to him at solemn obsequies.—*Ibid.* Reason.

* YOJANA or JOJANA is a measure of distance equal to four *krosa* or *kos*, which at 800 cubits or 400 yards to the *kos* will exactly be nine miles.

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The law may be thus briefly recapitulated :—

Vyavasthá. **648.** A son, a grandson, and a great-grandson succeed to the estate of a father, of a paternal grandfather, and of a paternal great-grandfather, on their decease; if co-heirs, residing in their own country, take not their shares during three generations, the right is lost to their descendants; but it is lost to the posterity of co-heirs residing in a foreign country, if the seventh in descent claim not (the share.)—*Coleb.* Dig., Vol. III, p. 449.

Vide Precedents, page 776.

Authority. NÁRADA :—Among unseparated kinsmen, let not one restore what has been expended. Or partition should take place of the visible wealth, corrected for income and expenditure.*

From the use of the particle '*or* (*vá*)' in this text (of NÁRADA); the meaning of the word strictly is intended to be conveyed; consequently,*—

Vyavasthá. **649.** Having compared the amount of the wealth which had accumulated at a time when no partition had taken place, with the amount expended, a division should be made of the balance actually remaining.†—*Dá. Kra. Sang.*, Chap. VII, § 31.

Exposition. If one son of the common ancestor go to a foreign country, and he and his offspring stay there, but the posterity of the other sons remain at home divided or undivided, then, should the descendants of him who went to a foreign country return, the rest shall give him a share *of the heritage.* In such a case, the form of distribution is this: one share, computed according to the number of sons left by the common ancestor, shall be received by the descendants of him who went to a foreign country, and be distributed amongst them in right of their respective fathers; but if they return after partition, they must contribute the due allotments out of their own several shares.—*Coleb.* Dig., Vol. III, (Lon. Ed.) p. 441.

Exposition. If a man leave his joint family (or the joint property of the family) not abandoning it, but making no claim thereon, his share of the debts, and other things above-mentioned, must be given to his male descendats. Such is the interpretation of BHAVA-DEVA.—*Ibid.*, p. 442.

* *Dá. Kra. Sang*, Chap. VII, § 30, 31. † See *ante*, page 548.

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CHAPTER VIII.

EXCLUSION FROM INHERITANCE (1).

As a man would be drowned who attempted to pass deep water in a boat made of woven reeds, so does a father sink in the gloom of death, who leaves only contemptible sons. *Coleb.* Dig., Vol. III, p. 298.

Consequently, he who is averse from performing constant and occasional rites, does not benefit his father: hence he is not capable of inheriting the paternal estate.—*Ibid.*

VRIHASPATI:—Though born of a woman equal in class, one who is not virtuous (*a*) shall have no claim to the paternal estate; it is ordained to devolve on those learned priests (*b*) who offer the funeral cake to the deceased. A son redeems his father from debt to superior and inferior beings. Consequently, there is no use for one who acts otherwise. What can be done with a cow which neither gives milk, nor becomes pregnant? Of what use was that son born, who is neither learned nor virtuous?—*Ibid.*, p. 301.

(a) "Not virtuous"—that is who has vices instead of virtues.—*Dá. Ta., Sans.*, p. 20.

(b) 'Learned priests'—are mentioned illustratively, the term comprehends any person who duly performs the obsequies and other constant and occasional rites.—*Coleb.* Dig., Vol. III, page 302.

KÁTYÁYANA:—Wealth is conferred for the sake of defraying sacrifices: therefore, distribute it among honest

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Annotations.

(1). Exclusion from inheritance, with the Hindú rests, in general, upon the same principle with succession to it, *i. e.*, it is connected with the obsequies of the deceased from their incapacity to perform which the excluded are incompetent as heirs. The causes of it are sufficiently numerous, defects both of body and mind, together with vice, constructive as well as actual, being attended with this effect; and lastly, devotion to any of the religious orders. —Strange's Hindú Law., Vol. I, p. 213.

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persons for that purpose, but not among women, ignorant men, or such as neglect their duties (*c*).—*Ibid.*, p. 317.

"Him, who neglects solemn rites, the ignorant man, one who is afflicted by grievous malady, and one who acts according to his mere pleasure, the wise have declared impure even until death."—*Ibid.*, p. 318.

Consequently by declaring them impure until their death, it is intimated that they are unfit for celebrating a sacrifice, for which purity is required.—*Ibid.*

(*c*) "One who neglects his duties;"—one who performs not the ceremonies enjoined at morning and evening twilight, and at noon, nor other daily acts of religion: a woman is disqualified for sacrificing, because she is incapable of sacred knowledge. The legislator declares an ignorant man, and one who neglects his duties, incompetent to sacrifice.—*Ibid.*, pp. 317, 318.

But JÍMÚTA-VÁHANA reads '*akarma-karminah*,' those who practise what is inconsistent with duties, instead of '*akarminah*,' those who neglect their duties. According to his opinion, persons addicted to gaming and the like are intended by the term.—*Ibid.*

ÁPASTAMBA.—No doubt, all the sons who are virtuous take their shares, but him who illegally acquires (*prati-pádayati*) wealth, even though he be the first born, let the king declare incapable of inheriting.—*Ibid.*, p. 298.

Who, though first born, illegally dissipates wealth; such is the construction and sense: "illegally" by gaming or the like: "incapable of inheriting," capable of inheriting no more than the residue of a share, after deducting so much as has been dissipated by him. Some thus expound the text.—The RATNÁKARA.—*Ibid.*, pp. 298, 299.

Others explain the term "*Prati-pádayati*" by 'acquires,' or 'earns.' Consequently, he who follows an illegal mode of subsistence, through avidity for wealth, without the sanction of the law, shall be deprived of his share. "Following an irregular profession," in the text of GOUTAMA, signifies subsisting by unlawful means.—*Ibid.*, p. 299.

ÁPASTAMBA.—A son, who diligently performs the obsequies of his father and other ancestors, is of approved excellence, even though he be uninitiated; not a son who acts otherwise, be he conversant even with the whole *Veda*. —*Dá. Bhá.*, Chap. V, § 5.

"Since a son delivers his father from the hell called '*put*,' therefore, he is named '*put-tra*' by the Self-Existent himself." By this and similar passages great benefits are

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stated, as effected by means of a son. His connection with the property is therefore the reward of his beneficial acts. If then he neglect them, how should he have his hire?—*Ibid.*

The principles inculcated by the texts above cited, though not abrogated or obsolete, are not at present, for the greater part, strictly observed and given effect to by the present courts of judicature, which generally follow in practice the *Vyavasthás* subjoined.*— Remark.

650. One who is impotent (*a*), idiot (*b*), or who is mad (*c*), lame (*d*), blind (*e*), deaf (*f*), or dumb (*g*) from birth, or has lost the use of a limb or an organ of sense (*h*), or who is inflicted with an incurable or obstinate and agonizing disease (*i*), or who is addicted to vice (*j*), formally expelled (*k*), degraded or outcast (*l*), his issue (*m*), or who is an enemy to his father (*n*), or who has assumed another order (*o*), or who is a hypocrite or a person wearing the token of religious mendicity (*p*), is excluded from inheritance. *Vyavastha.*

See the following Remarks and Precedents, pp. 777—819.

MANU:—Impotent persons (*a*), outcasts (*l*), persons born blind (*e*) or deaf (*f*), mad men (*c*), idiots (*b*), the dumb (*g*), and such as have lost the use of a limb (*h*), are excluded from shares of the heritage.† Authority.

YÁJNYAVALKYA:—An outcast (*l*), and his issue (*m*), an impotent person (*a*,) one lame (*d*), a mad man (*c*), one afflicted with an incurable disease (*i*,) must be maintained; excluding them (however) from participation.† Authority.

* "In regard to the causes of disinheritance, discussed in the Digest, B. V., Chap. 5, Sect. I, corresponding with the 5th Chap. of JÍMÚTA-VÁHANA, and the 10th Sect., Chap. 2, of the *Mitákshará*, I am not aware, that any can be said to have been abrogated, or to be obsolete. At the same time, I do not think, any of our courts would go into proof of one of the brethren being addicted to vice, or profusion, or of being guilty of neglect of obsequies, and duty toward ancestors. But expulsion from caste, leprosy, and similar diseases, natural deformity from birth, neutral sex, unlawful birth resulting from an uncanonical marriage, would doubtlessly now exclude; and, I apprehend, it would have to be so adjudged in our Adawluts. That the causes of disinheritance, most foreign to our ideas, are still operative, according to the notions of their law among the natives, I conclude from some cases that came before me, when I presided in Zillah Courts. I will mention but one, which occurred at Benares, at the suit of a nephew against his uncle, to exclude him from inherited property, on the ground of having neglected his grandmother's obsequies. He defended himself, by pleading a pilgrimage to *Gayá*, where he alleged he had performed them. His plea, joined with assurances of his attending to his filial duty in this respect in future, was admitted; and the claim to disinherit him, disallowed"—Colebrooke's Remarks. See Str. H. L., (F. E.), Vol. I, pp. 219, 220.

† *Dá. Bhá.*, Chap. V, § 8, 10;—*Colcb.* Dig., Vol. III, pp. 318, 321.

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Authority. NÁRADA :—One afflicted with an obstinate and agonizing disease (*i*), and one insane (*c*), blind (*e*), or lame from his birth (*b*), must be maintained by the family, but their sons may take the shares (of their parents.)*

Authority. VISHNU :—The degraded (*l*) and the impotent (*a*), those that are afflicted with incurable disease (*i*), as well as such as have lost an organ [of senses or action (*h*)], are excluded from inheritance.—*Smri. Chan.*, Chap. V, Cl. 8.

Authority. DEVALA :—When the father (is dead,) as well as in his life-time,) an impotent man (*a*), a leper (*i*), a mad man (*c*), an idiot (*b*), a blind man (*e*), an outcast (*l*), the offspring of an outcast (*m*), and a person wearing the token of religious mendicity (*p*), are not competent to share the heritage.*

Authority. VASHISHTHA :—Those who have assumed another order (*o*), are excluded from participation.*

Authority. MANU :—All those brothers who are addicted to vice (*j*), lose their title to inheritance.*

Authority. NÁRADA :—An enemy to his father (*n*), an outcast (*l*), impotent person (*a*), and one who is addicted to vice (*j*), [or has been expelled from society (*k*)], take no shares of the inheritance, even though they be legitimate; much less if they be sons of the wife by an appointed kinsman.*

Remark—The last word of the first hemistich of the above text of NÁRADA is '*Oupapátika*' (addicted to vice) according to JÍMÚTA-VÁHANA, RAGHU-NANDANA, SRÍ-KRISHNA, and some other authors of this (Bengal) school, and '*apa-pátrita*' (formally expelled from society) according to JAGAN-NÁTHA, and most of the authors of the other schools as will be presently seen.

Authority. "The heritable right of one, who has been expelled from society (*k*), and his competence to offer oblations of food, and libations of water, are extinct."†

Authority. DEVALA :—On the death of a father, (or other owner of property), neither an impotent man(*a*), nor a person afflicted with elephantiasis (*i*), nor a mad man (*c*), nor an idiot (*d*), nor one *born* blind (*e*), nor one degraded for sin (*l*), nor

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* *Dá. Bhá.* Chap. V, § 6, 11, 13.—*Coleb.* Dig., Vol. III, pp. 303—325.

† Cited in the *Dáya-bhága* and *Víra-mitrodoya* as a passage of A'PASTAMBA, but in the *Viváda-chintámani* and *Smriti-sára*, it is referred to SHANKHA, and in the *Ratnákara*, *Smriti-chandrikà*, *Viváda-bhangárnava*, &c., to SHANKHA and LIKHITA. See *Dá. Bhá*, Chap. V, § 3, and *Coleb.* Dig., Vol. III, p. 300.

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the issue of a degraded man (*m*), nor a hypocrite or impostor (*p*) shall take any share of his heritage.—*Coleb.* Dig., Vol. III, p. 304.

(a) Impotence is of two kinds: the impotence of one who is deprived of the generative organ, and the incapacity of doing the virile act although the generative organ exist.* The last is described by KÁTYÁYANA:—"He is called impotent whose urine froths not, whose feces sinks in water, and whose generative organ is deficient in erection or in seminal juices."†—*Coleb* Dig., Vol, III, pp. 320, 321. See *Dá. Bhá.*, Chap. V, § 8. Explanation.

(b) 'An idiot' is a person not susceptible of instruction.†—*Dá. bhá.*, Chap. V, § 9. Explanation.

(b) 'An idiot,'—devoid of knowledge of himself and others.—*Coleb.* Dig., Vol. III, p. 319.

RAGHU-NANDANA explains 'idiot' as one who cannot support the performance of duties: others explain the term, void of understanding, or one whose intellectual faculties are imbecile.—*Coleb.* Dig., Vol. III, pp. 315, 321.

(c) 'A mad man'—in the text of DEVALA,—signifies one insane from his birth; for the import is the same with that of the text of NÁRADA.†—*Ibid.*, p. 315. Explanation.

(c, d) Here 'lame' signifies lame from his birth; and the term 'mad' also implies mad from his birth, as that is expressly declared in NÁRADA's text above cited.† Explanation.

(d) One who cannot walk on either of his feet is lame.†—*Dá. Bhá.*, Chap. V, § 10.

He who cannot walk on either foot, says JÍMÚTA-VÁHANA, is lame. According to his opinion, if one foot can be used in walking, there is no true lameness. He who cannot walk on both of his feet, say modern lawyers, is lame. According to their opinion, if both feet can be used in walking, then only there is no lameness;(1) consequently a man is called lame even Remark.

Annotations.

(1) By this law, privation of any one of these faculties excludes from inheritance, as does lameness, but it must be entire, that is, the individual must be so lame as not to be able to walk on either foot, and so, as to his hands, he must be deprived of the use of both.—Stra. H. L., Vol. I, (2nd Ed.), p. 154.

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* In the text of DEVALA, cited in the *Dáyá-Koumudí*, impotence is described to be of six kinds, all of which, however, being comprehended in the two kinds of impotence above mentioned, it is unnecessary here to give a detail of the same.

† *Vide* Precedents, pages 811, 812.

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though he can move on one foot. The opinion of JÍMÚTA-VÁHANA is alone correct; for in the text of MANU, the general failure of organs is not signified by the expression, 'such as have lost the use of a limb,' (literally, such as have not their organs:) were that the meaning, one who had only lost the use of his hands would be capable of inheriting.—*Coleb.* Dig., Vol. III, page 421.

Remark. It should here be remarked that the term 'lame' being contiguous to the word blind, must signify born lame. In like manner, 'persons deprived of the use of their hands' must signify such as are destitute of the use of both hands from the day of their birth.—*Ibid.*, p. 322.

Explanation. *(e, f)* The term 'born' is connected in construction with the words 'blind' and 'deaf.'*—*Dá. Bhá.*, p. 103.

'Born blind and deaf.'—That is, by nature, not those who have become so from some adventitious cause: the meaning therefore is, those who are blind and deaf from the period of their birth.*—*Dá. Kra. Sang.*, Chap. III, § 3.

Remark. In practice, the succession of one who becomes deaf in the course of his life, occurs even though the deafness be incurable: the same is also proper in a case of blindness. Consequently the term must be understood as signifying born blind, or born deaf. Thus it is expressly declared by—NÁRADA:—"One afflicted with an obstinate and agonizing disease (*i*), one insane, blind or lame, from his birth, must be maintained by the family; but their sons may take the shares (of their parents.")—*Coleb.* Dig., Vol. III, pp. 303, & 319.

Remark. "Persons born blind."—By the mention of birth the Legislator suggests the incurableness, "not the origin of the blindness," (3 Dig., 319.) By this passage it is indicated by JAGAN-NÁTHA that the person who becomes incurably blind in the course of his life, is also excluded from inheritance; and it is also intimated by analogy that the persons who become incurably deaf, and so forth, in the course of their lives, are also disherited.

Remark. Of the two conflicting opinions of his, as above mentioned, the former is agreeable to practice, but the latter is according to the letter of the law.

"As one who becomes blind in the course of his life ought to share the heritage, so ought one who becomes impotent." (3 Dig., 320.) This passage of JAGAN-NÁTHA's must be construed to intend blind persons and so forth, who have become so in the course of their lives and are not past cure; for the disherison of the blind and the rest who are incurable having been already determined by himself, the above dictum would be contradictory to his own decision, were it applicable to those who are in a different condition.

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* *Vide* Precedents, pages 811, 812.

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(g) One who is incapable of articulating sounds is dumb.—*Dá. Bhá.*, Chap. V, § 9. Explanation.

JÍMÚTA-VÁHANA says:—"One who is incapable of articulating sounds is 'dumb.' RÁMA-NÁTHA explains it "one who is deprived of speech."* Remark.

(h) "Such as have lost the use of an organ (of sense)."—This must not be taken to indicate the total failure of limbs or organs, as in that case it would be impossible for a person to live; nor must it mean the failure of one limb only, as in that case one is not deprived of an organ, and one who had only lost the use of one hand would be incapable of inheriting. Logicians do not acknowledge any essential property common to all organs and peculiar to them: hence, a general failure of them *all* cannot be affirmed by a single term; but the general failure of a particular one or more (not of all) is the meaning. That is, the total failure of (power to use) the hands or feet; the total failure of the sense of smelling or tasting; the deprivation of hearing, which constitutes deafness; the total failure of the generative organs (which is called) impotency; dumbness, or the total failure of speech which depends upon the tongue; and so forth.*—See *Coleb.* Dig., Vol. III, pp. 321, 322. Interpretation.

(h) '*Those who have lost a sense or limb*'—Any person, who is deprived of an organ (of sense or action), by disease or other cause, is said to have lost that sense or limb.—Mit. In., Chap. II, Sect. x, § 3.

'*Those who have lost a sense or limb*'] signifies those who have been deprived of hands, legs, or any other member of the body.—*Vi. Chi.*, (*Sans.*), p. 132. ENG., p. 243.

Such persons are not competent to perform ceremonies relating to *Vedas* and *Smriti*. They are consequently not entitled to inherit paternal property. This is the correct meaning of the preceding text (of MANU).—*Vi. Chi.*, p. 243. Remark.

(i) "*Obstinate diseases*" are atrophy and the rest. "*Agonizing distempers*" are leprosy and the like.(2)*—*Coleb.* Dig., Vol. III, page 303.

(*i*) '*An incurable disease.*'—a hopeless leprosy or the like.* *Coleb.* Dig., Vol. III, p. 321.

Annotations.

(2) A leper and the like are not competent to receive shares of their paternal estate.—*Vi. Chi.*, p. 244.

Of *obstinate* diseases, marasmus, or atrophy, is mentioned as an instance; of the *agonizing*, leprosy; but it must be of the sanious or ulcerous (the worst) kind; of which a text of the *Bhavishya-purāna* gives a disgusting description.—Stra. H. L., Vol. I, p. 156.

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* *Vide* Precedents, pages 811, 812, 813.

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There are different kinds of leprosy, the vilest of them is that with ulcers discharging matter or blood as declared in the *Bhavishya-purána* cited in the *Viváda-bhangárnava*. Thus—

Leprosies described.

Bhavishya-purána :—" Hear, O priest! the enumeration of various sorts of leprosy, the last worse than the first: blisters on the feet, a deformity in the generative organs, cutaneous fissures, true elephantiasis, ulcers, coppery blotches, black and (eighthly) white leprosy.—Among these, that leper is most vile, in respect of all religious acts, who is afflicted with ulcers on all his limbs, *especially* on his temples, forehead, and nose.—When he dies, let his corpse be cast near a sacred river, or other holy place, or at the root of a sacred tree; let not a funeral cake or libation of water be offered, nor let his corpse be burnt, nor obsequies be celebrated.—Should a man through affection burn the corpse of a leper, who has been six or even three months infected with the disease, that man must perform the lunar penance of an anchoret."—See *Coleb.* Dig., Vol. III, p. 309.

Remark.

"Among those lepers of eight sorts, he who is incapacitated for all solemn rites is described (this word must be supplied) as afflicted with ulcers on all his limbs, or on his temples, forehead and nose." Since this is merely illustrative, he who is infected with that foul leprosy which is attended with ulcers on any other part of the body, is abominated, *and disqualified* for all solemn rites. Or the term 'on all his limbs,' being employed by the same rule by which two names for kine are used at once in a general and particular sense, the meaning is, 'on any part of the body, whether the temples and the rest, or parts different therefrom.' Or else the meaning may be, "afflicted with ulcers on any one or more of all the parts of the body, or especially with those other ulcers called coppery, black, or white sores, on any one of the parts specified, namely, the temples and the rest: he who is afflicted with any one of these diseases is *most abominated.*"—See *Coleb.* Dig., Vol. III, pp. 309, 310.

PULASTYA says:—" On the occasion of the eclipses of the sun or moon, and offering of the ten funeral cakes (*dasha-pinda*) to the *manes* of the deceased (on the day before their first *shráddha*,) as well as in places of great sanctity, there is no impurity occasioned by ulcers." The same, however, subsists on other occasions or in other places, thus DEVALA: —" The persons with sores, those lying in child birth, those delivering women, drunkards, mad men, also menstruous women, and the persons whose relations are dead, and those

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impure, these eight are disallowed (to perform religious rites at those times.")—*Práyashchitta-tattwa.*

Reconciliation

"To reconcile the discordant opinions of many wise persons concerning the competence of the leper *to inherit and to perform acts of religion*, various modes have been exhibited, but, according to both opinions, a man infected with grievous leprosy is in effect capable of inheriting when he has performed penance. According to RAGHU-NANDANA and others, men afflicted with elphantiasis, marasmus, honey-colored gonorrhœa, black teeth, and other distempers difficultly cured, are incapable of inheritance so long as penance be unperformed." (See *Coleb.* Dig., Vol. III, pp. 314, 315.) This reconciliation of JAGAN-NÁTHA'S is not, however, correct in every respect, inasmuch as no author is of opinion that a leper with ulcers discharging blood or putrid matter becomes, after performing the expiatory penance, entitled to inheritance. On the contrary, even after the performance of the expiatory penance, he, owing to his remaining still impure on account of the ulcers, as well as not being admitted into society, is excluded from performing *shráddhas* and other solemn rites, and taking the heritage.*

Remark.

This is the unanimous opinion of all lawyers, and also consistent with reason, for, although by expiatory penance that effect of his sin, which caused him to be doomed to hell, be destroyed, yet the other effect of it, which caused him to be excommunicated from society, still subsisted. In practice too, a leper with ulcers discharging blood or putrid matter, or both, is never seen to perform *shráddhas* and other solemn rites, and inherit patrimony.

Remark and decision.

Consequently, by the term "leper" is here meant the person afflicted with a light leprosy unexpiated by penance, and one afflicted with leprosy discharging matter or blood or both whether expiated or not expiated by penance; because the sinful taint of the person afflicted with slight leprosy being removed by expiatory penance he has become entitled to perform *shráddhas* and other rites, and, as such, he has a right to inherit. Now, although the sinful taint of a person afflicted with a leprosy discharging matter or blood or both, be removed by expiatory penance, yet the other effect of his sin, namely, that of excommunication from society, subsists, for which reason, as well as that of his always remaining impure on account of the ulcers, he is incompetent for the performance of *shráddhas* and other rights, and being so, he is not entitled to the heritage.

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* "On there being a sore above the knee one must not perform the constant (religious) rites; he or she must not perform also the casual rites, if there be bleeding even below it."—A text cited in the *Nirnaya-sindhu.*

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By the term "or the like"* are meant the other incurable diseases occasioned by crimes, they being equally [with leprosy] the causes of disherison.

Most of the diseases occasioned by crimes or sins have been thus enumerated by—

Diseases occasioned by crimes or sins.

MANU:—"Some evil-minded persons, for sins committed in this life, and some for bad actions in a preceding state, suffer a morbid change in their bodies.—A stealer of gold (from a *Bráhmana*) has whitlows on his nails; a drinker of spirits, black teeth; the slayer of a *Bráhmana*, a marasmus; the violator of his *Guru's* bed, a deformity in the generative organs; a malignant informer, fetid ulcers in his nostrils; a false detractor, stinking breath; a stealer of grain, the defect of some limb; a mixer of bad wares with good, some redundant member; a stealer of dressed grain, dyspepsia; a stealer of holy words, *or an unauthorized reader* of the Scriptures, dumbness; a stealer of clothes, leprosy; a horse-stealer, lameness; the stealer of a lamp,† total blindness; the mischievous extinguisher of it, blindness in one eye; a delighter in hurting sentient creatures, perpetual illness; an adulterer, windy swellings in his limbs. Thus according to the diversity of action, are born men despised by the good, stupid, dumb, blind, deaf, and deformed. Penance therefore, must invariably be performed for the sake of expiation; since they who have not expiated their sins, will again spring to birth with the disgraceful marks."—MANU, Chap. XI, *vs.* 48—58.

Diseases occasioned by crimes or sins.

VISHNU:—"They who have suffered the pains experienced in hell, and have passed through the reptile state, have the marks *of their yet unexpiated crimes* in the human form; an atrocious sinner becomes leprous; the slayer of a priest is afflicted with marasmus; a drinker of spirits has black teeth; a stealer of gold has whitlows on his nails; the violator of his preceptor's *(guru's)* bed has a deformity in the generative organs."—*Coleb.* Dig., Vol. III, 314.

SÁTÁTAPA:—"The morbid mark proceeding from a heinous crime is produced in seven successive births: (the right of inheritance) is obstructed by malady; but that is removed by the first or common penance and the like. And so is leprosy, marasmus, gonorrhœa, and dysentry." The stranguary or suppression of urine, the stone or gravel in the bladder or kidneys, cough, diarrhœa or dysentry, attended with fever, fistula *in ano*, fistula scrofula or inflammation of the glands or of the neck attended

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* Contained in page 565.

† "The stealer of a lamp," &c. This *Vachana* or text is not in the printed Institutes of MANU; but is found in *Medhátithi's* Commentaries on, and in Sir William Jones's translation of, the Institutes of MANU: the translation of the last foot of the verse found in the former is, 'he who does not hurt any one has no disease,' instead of 'an adulterer (has) windy swellings in his limbs,' as in the latter.

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with pustules or boils, the palsy, the destruction of an eye or eyes: those and other diseases are said to be occasioned by heinous crimes."—See *Coleb.* Dig., Vol. III, p. 313 *et seq.*

SATÁTAPA again:—"The piles or hemorrhoids and other (similar) diseases of men are caused by crimes in the excessive degree."*

The crimes in the excessive degree are 'carnal connection with a mother, daughter, sister, and son's wife.'—A text of VISHNU cited in the *Práyashchitta-tattwa.*

Diseases occasioned by crimes in the third degree.

There are also diseases occasioned by the crimes in the third degree: they are the ascites or dropsy, liver, spleen, the cholic, tumors, carbuncles, or buboes, asthma, indigestion, fever, vomiting, forgetfulness, loss of reflection, the goitre or throttling, the eruption of a red color (considered as the first step of leprosy), the measles, small-pox, water-pox, &c.: these do not, however, exclude from inheritance.—See the *Malamása-tattwa.*

Remark.

In the text of DEVALA, the word "elephantiasis" is illustrative of those *morbid changes,* for, in the texts which will be quoted, it is expressed by the general term 'disease' or 'malady.' Then a man afflicted by gonorrhœa or dysentery would be also disqualified. Gonorrhœa, dysentery and the rest, may also proceed from the pernicious effects of drugs; but if they be ascertained to be the marks of an atrocious crime, or of sin in the highest degree, disability is admitted by the terms of the text of NÁRADA: ["One afflicted with an obstinate and agonizing, disease," &c. *Ante,* p. 562.)]—*Coleb.* Dig., Vol. III, p. 314. See *ante,* p. 565.

Remark.

The other sinful diseases, defects or crimes, though not congenital, cause exclusion from inheritance in the case of their existing, and not being expiated by penance, at or about the time when succession opens, or partition takes place, and not otherwise. (3)

Annotations.

(3). It is said in the *Vivâda-bhangârnava,* "One who subsequently becomes insane from pernicious power of mineral drugs or the like, is not excluded, any more than one who subsequently becomes blind or lame.—Macn., H. L., Vol. II, p. 135.

And with regard to the father, or the delinquent himself, where the exclusion is not for natural defects, the cause must have arisen previous to the division, or descent, of the property; if it do not occur till after, succession is not divested by it.—Stra., H. L., Vol. I, p. 163.

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* The crimes in the excessive degree are twice more atrocious than those in the first degree: in the institutes of MANU, however, they are included in those in the first degree.

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Remark. RAGHU-NANDANA also holds that expiation for a man afflicted with elephantiasis, or other similar disease, is ordained for the purpose of enabling him to perform acts of religion ordained in the *Veda*. By parity of reasoning, he becomes competent to inherit property, as well as to perform religious ceremonies. It is not found in any other case that a son competent to perform obsequies, and other acts of religion, is not qualified to inherit.—*Coleb.* Dig., Vol. III, p. 305.

Explanation. *(j)* '*Addicted to vice*' (*oupa-pátika*); that is, addicted to forbidden acts, such as slaughter or the like, and reprehensible means of subsistence.—See *Ibid.*, p. 299.

KULLÚKA BHATTA expounds "*addicted* to any vice," devoted to gaming or the like. Others explain it 'inclined to dissipate the wealth of the family.' JÍMÚTA-VÁHANA interprets it 'averse to performing their father's obsequies, and other acts of religion.'—*Ibid*, p. 300.

'*Addicted to vice*,'—committing acts which exclude persons from performing the obsequies and other rites on the death of their ancestors;—that is, having carnal connection with such persons as are not to be so associated with.*—Commentary on the *Dáya-bhága*, *Sans.*, page 118.

Explanation. (*k*) 'one who has been expelled from society (*apa-pátrita*)' is a person excluded from drinking water in company.—*Dá.Bhá.*, Chap. V, § 3.—See *Dá. Kra. Sang.*, Chap. III, § 4, 6.

"Formally expelled" means formally degraded; SANKHA and LIKHITA having declared "the heritable right of him who has been formally degraded [*apa-pátrita*], and his competence to offer oblations of food and libations of water is extinct.*(4) *Smri. Chan.*, Chap. V, Cl. 6.—See *Coleb.* Dig., Vol. III, p. 300.

'A man formally expelled (*apa-pátrita*)' one banished with the ceremony of kicking down a water pot, for a crime *in the third degree*, such as killing a *Kshatriya* without malice or the like.*—See *Coleb.* Dig., Vol. III. p. 303.

(l) Degraded,—that is excommunicated for a heinous crime, or for (repeated) crimes in the second or third degree.†(4)

Annotation.

(4) It remains to consider one case that may be said to be with reference to personal delinquency, *instar omnium*—occurring in every enumeration on the subject, as a cause of exclusion, namely;

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* *Vide* Precedents, pages 814, 816.

† See *práyashchitta-viveka*, *práyashchitta-tattwa*, and *Coleb.* Dig., Vol. III, page 304, *et seq.*

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Degradation takes place in the case of a heinous crime once consciously committed or twice unconsciously committed.

Heinous crimes described.

The heinous crimes are as follow:—Killing a *Bráhmana*, drinking forbidden liquor (*q*), stealing (gold from a priest), adultery with the wife of a father, natural or spiritual, and associating with such as commit those offences (*r*), wise legislators must declare to be crimes in the highest degree.—MANU., Chap. XI, *v.* 55.

A person is also degraded by once committing such a sin or crime as would cause his expulsion from caste.(2)—See *Coleb.* Dig., Vol. III, p. 304 *et seq.*

Exposition

(*q*) Here, by drinking is meant the drinking of unconsecrated spirituous liquor; because the drinking of consecrated or purified liquor, which is considered a lawful act, does not cause degradation. Thus it is declared in the *Nirukta-tantra* (Chapter V.) "Drinking unconsecrated spirituous liquor, a *Bráhmana* becomes guilty (of the sin) of killing a *Bráhmana;* but drinking the consecrated or purified liquor, a *Bráhmana* shines as the burning fire.—The text, prohibiting the drinking of spirituous liquor, purports the drinking of the cursed (that is, unconsecrated) liquor. In all the four *yugas,** the spirituous liquor has been (considered) the purifier (of any one's person:) it has become undrinkable only by reason of being cursed: consequently, it would be (again) drinkable on the curse being removed."

As to the text cited in the *Tithi-tattwa*—"Spirituous liquor is unfit (prohibited) to be drunk, given, and received,"—its

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Annotation.

degradation, or the case of the *outcast*. Accompanied with certain ceremonies, its effect is, to exclude him from all social intercourse, to suspend in him every civil function, to disqualify him for all the offices and all the charities of life; he is to be deserted by his connexions, who are, from the moment of the sentence attaching upon him, to "desist from speaking to him, from sitting in his company, from delivering to him any inherited or other property, and from every civil or usual attention, as inviting him on the first day of the year, or the like."—So that a man under these circumstances, might as well be dead, which, indeed, the Hindú law considers him to be, directing libations to be offered to his *manes* though he were naturally so.—Stra., H. L., Vol. I, p. 160.

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* *Yuga*'—an age. In the *Hindú* system of chronology there are four *yugas*, which succeed each other in eternal rotation, *viz.*, the *Satya yuga*, comprising a period of one million seven hundred and twenty-eight thousand years; the *Tretá yuga*, one million two hundred and ninety-seven thousand years; the *Dwáparu yuga*, eight hundred and sixty-four thousand years, and the *Kali yuga*, four hundred and thirty-two thousand years.

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meaning is, as explained by RAGHU-NANDANA himself, that "spirituous liquor, unless consecrated or offered to a deity, is unfit to be drunk and received."

"In (lawfully) tasting meat, in drinking fermented liquor, in caressing women, there is no turpitude; for, to such enjoyments men are naturally prone: but a virtuous abstinence from them produces a signal compensation" (MANU, Chap. V, *v*, 56).—This text is also interpreted by KULLÚKA-BHATTA and the rest to intend unprohibited meat and so forth.

Explanation. (*r*) 'Associating with such as commit those offences,'—that is, associating with such a person, for a period of one year, as has committed the crimes in the highest degree; this is declared in the text subjoined: "He, who associates himself for one year with a fallen sinner, falls like him; not by sacrificing, reading the *Veda*, or contracting affinity with him, (since by those acts, he loses his class immediately,) but even by using the same carriage or seat, or by taking his food at the same board."—MANU. Chap. XI, *v*. 181.

The crimes or sins in the second degree or nearly equal to those in the highest degree are as follow :—

Crimes or sins in the second degree. "False boasting of a high tribe, malignant information before the king, of a criminal *(who must suffer death)*, and falsely accusing a spiritual preceptor, are crimes *(in the second degree*, and) nearly equal to killing a *Bráhmana*.—Forgetting the texts of scripture, showing contempt of the *Veda*, giving false evidence *(with a bad motive)*, killing a friend *(without malice)*, eating things prohibited, or, from their manifest impurity, unfit to be tested, are six crimes nearly equal to that of drinking spirits. To appropriate a thing deposited *(or lent for a time)*, a human creature, a horse, precious metals, a field, a diamond or any other gem, is nearly equal to stealing the gold (of a *Bráhmana*). Carnal commerce with sisters by the same mother, with little girls, with women of the lowest mixed class, or with the wives of a friend, and a son, the wise must consider as nearly equal to a violation of the paternal bed."—MANU., Chap. XI, *vv.* 56, 57, 58 and 59.

These crimes, whether perpetrated consciously or unconsciously, cause degradation generally by the commission (of any of them) more than once.—*Vide Práyashchitta-tattwa* and *Práyashchitta-viveka.*

Remark. A sinner in the third degree is only excluded from participation in the case of repeated offences: (such) crimes are therefore mentioned in the plural number.—*Coleb.* Dig., Vol. III, page 304.

The crimes or sins in the third degree are as follow :—

Crimes or sins in the third degree. "Slaying a bull or cow, sacrificing what ought not to be sacrificed, adultery, selling one's-self, deserting a preceptor, a mother, a father, or a son, omitting to read the scripture, and

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neglect of the fires *prescribed by the Dharma-shástra*;—The marriage of a younger brother before the elder, and that elder's omission to marry before the younger, giving a daughter to either of them, and officiating at their nuptial sacrifice;—Defiling a damsel, usury, want of perfect chastity in a student, selling a holy pool or garden, a wife, or a child;—Omitting the sacred investiture, abandoning a kinsman, teaching the *Veda* for hire, learning it from a hired teacher, selling commodities that ought not to be sold;—Working in mines of any sort, engaging in *dykes, bridges or other* great mechanical works, spoiling medicinal plants (repeatedly), subsisting by *the harlotry* of a wife, offering sacrifices and preparing charms to destroy (the innocent);—Cutting down green trees for fire wood, performing holy rites with a selfish view merely, and eating prohibited food (once without previous design);—Neglecting to keep up the consecrated fire, stealing *any valuable thing besides gold*, non-payment of (*the three*) debts, application to the books of a false religion, and excessive attention to music or dancing;—Stealing grain, base metals, or cattle, familiarity (*by the twice-born*) with women who have drunk inebriating liquor, killing without malice a woman, a *Shúdra*, *Voishya*, or a *Kshatriya*, and denying a future state of rewards and punishments, are all crimes in the third degree, (*but higher or lower* according to circumstances).—MANU, Ch. XI, *vv.* 60–67.

Effect of expiatory penance.

JAGAN-NÁTHA, on the authority of RAGHU-NANDANA, justly holds such degraded persons as have not performed penance or are averse to it to be really degraded for sin, and not entitled to inherit; thus: "One degraded for sin is he who has slain priests, or committed some other atrocious crime, and who has not performed penance, but (on the contrary) is averse to it; for RAGHU-NANDANA says: 'aversion to penance on the part of the fallen sinner contributes to the forfeiture of his right to his own property. His not being averse to penance contributes to his right in the paternal estate."*—*Coleb.* Dig., Vol. III, p. 315.

Effect of expiatory penance.

RAGHU-NANDANA is also followed by SRÍ-KRISHNA TARKÁLANKÁRA, who says: "Here expiatory penance having been ordained for a person degraded for sin, even by the gift (at the expense) of his whole property, and so forth, the word (degraded) must be preceded by the adjectivial phrase 'averse to penance,' degradation not preceded by (attended with) the inclination of performing the penance is the cause of forfeiture of the right to inheritance."*—Commentaries on the *Dáya-bhága, Sans.*, page 25.

Remark.

The above doctrine being, nevertheless, applicable to those degraded persons only for whom penance is ordained, the degradation not expiable by penance does always cause forfeiture of right.

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* *Vide* Precedent, page 814.

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Remark. Now, as the penance for a degradation which causes the loss of caste with total excommunication from society, cannot restore the same, though it removes or expiates the sin, such degradation must always cause the forfeiture of right (5); because a sin has two effects,—damnation to hell, and excommunication from society,—one of which is, in this instance, removed by penance, but the (other, namely) excommunication from society, still subsists.(5)—See *Práyashchitta-tattwa.*

Explanation. (*m*) 'His issue'—that is, the son begotten (by an outcast) after his degradation. Although by the term outcast or degraded, his son also is intended; for he is degraded being procreated by an outcast, yet he (the son of an outcast) is mentioned, for the purpose of indicating the disherison of the others (*viz.,*) the sons of the impotent persons and the rest. It should

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Annotation.

(5) As, with us, there was the less and greater excommunication, so, of offences considered with reference to their occasioning exclusion from inheritance among the *Hindús,* they may also be regarded in a two-fold point of view. This we learn from a case that was before the Sudder Dewany Adawlut in 1814, in which the official *Pandits,* having been referred to, distinguished between "those which involve partial and temporary degradation; and those which are followed by loss of caste;"—observing that "in the former state, that of partial degradation, when the offence which occasions it is expiated, the impediment to succession is removed; but in the latter, where the degradation is complete, although the sinfulness of the offence may be removed by expiatory penance, yet the impediment to succession still remains; because a person finally excluded from his tribe must ever continue to be an outcast." In the case alluded to, the party in question having been guilty of a series of profligate and abandoned conduct, having been shamefully addicted to spirituous liquors, having been in the habit of associating and eating with persons of the lowest description and most infamous character; having wantonly attacked and wounded several people at different times; having openly co-habited with a woman of the Mahomedan persuasion, and having set fire to the dwelling house of his adoptive mother, whom he had more than once attempted to destroy by other means, the *Pandits* declared that "of all the offences proved to have been committed by Sheo-nath, one only, namely, that of co-habiting with a Mahomedan woman, was of such a nature as to subject him to the penalty of expulsion from his tribe *irrevocably*;"—and of this opinion was the Court.—Colebrooke's Remarks.—See Stra., H. L., (F. E), Vol. I, pp. 221, 222.

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not be alleged that the term 'degraded' comprehending also his son born after degradation, the expression his issue is used for the purpose of including the son of an outcast born before his degradation, inasmuch as he also, being free from defect like the sons of the impotent and the rest, is justly entitled to inheritance.—The *Dáya-bhága* and *Srí-krishna's* Commentary thereon.*—*Dá. Bhá.*, Sans., p. 111. See *Coleb.*, *Dá. Bhá.*, Chap. V, para. 12.

(*m*) "The issue of a degraded man:" issue (procreated and) born after the commission of the act, which is punished by degradation; for this agrees with the text of VISHNU.*—See *Coleb.* Dig, Vol. III, page 315.

By the term outcast, his son also is intended; for he is degraded, being procreated by an outcast.—*Dá. Bhá.*, Chap. V, § 12.

(*n*) "*An enemy to his father*:"—one who ill-treats his father during his life-time, or one who is averse to performing his obsequies when dead.—*Dá. Kra. Sang.*, Chap. III, § 3. See *Dá. Ta. Sans.*, p. 21. Explanation.

He who hates his father is a professed enemy to him: enmity is manifested by attempting his life and so forth; but after the death of the father, by withholding the libations of water and the like, *which should be offered* for his sake.*—*Coleb.* Dig., Vol. III, p. 303.

(*o*) 'Another order'—An order other than that of a house-holder or married man.*(1)—*Coleb.* Dig., Vol. III, p. 327. Explanation.

(*o*) Another order, means an order different from that of a house-holder (*grihastha*) or married man. Hence it must not be said that incompetency to inherit attaches to that kind of *Brahmachárí* also who is ('*upa-kurvána*,) a tem-

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Annotation.

(1) *Another order* means an order other than that of house-keeper or married man.—*Vi. Chi.*, p. 246.

It will appear in a subsequent chapter, that on entry into either of the two religious orders, the *devotee* (like the professed monk with us before the reformation) becomes *civiliter mortuus*; and the next heir succeeds, as though he were naturally deceased. And, as the *devotee* himself, abdicating secular concerns, is incapacitated from inheriting, so is the religious *pretender*, and the eventual apostate. Under the former term may be included *hypocrites* and *impostors*, used synonymously for those who, usurping sacred marks, practise austerity with an interested design.—Stra., H. L. Vol. I, p. 164.

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* *Vide* Precedents, pages 814, 815.

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porary student (*ante*, p. 113). The words "another order" simply refer to that order, the entering into which incapacitates one for the order of house-holder.*—*Smri. Chan.*, Ch. IV, Cl. 7.

Explanation. (*p*) A person wearing the token of (religious) mendicity, is one who has become a religious wanderer or ascetic.*—*Dá. Bhá.*, Chap. V, § 11.

(*p*) A hypocrite (*Lingí*), an impostor.—*Dá. Ta.*, *Sans.*, page 21.

'A hypocrite (*Lingí*),' one who rigidly practises austerities with an intent to deceive.*—The *Ratná-kara* cited in the *Viváda-bhangárnava.*—See *Coleb.* Dig., Vol. III, p. 305.

'*Wearing the token*,' assuming the prohibited mark (*linga*).*—*Vyav. Mayú.*, Chap. IV, Sect. xi, § 10.

The conclusion of the whole of the above is as follows:—

Vyavasthá. 551. Persons blind, mad, lame, deaf, dumb, or deprived of an organ of sense, are debarred from inheriting in the case of their having been so circumstanced from birth, and not otherwise.†

Vide Precedents, pages 777—779, 811, 812.

Vyavasthá. 652. The other sinful diseases, defects or disqualifications, though not from birth, cause exclu-

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Annotation.

652. It is said in the *Viváda-bhangárnava*, "One who subsequently becomes insane from pernicious power of mineral drugs or the like, is not excluded, any more than one who subsequently becomes blind or lame.—Macn., H. L., Vol. II, p. 135, note.

The disease that disables (an obstinate or an agonizing one,) must be ascertained to be the sign of an atrocious crime, or it has not the effect of excluding; it being, not the disease, but the sin that is the cause of the disability; and hence it may be removed by penance, the impediment continuing to operate only so long as penance remained unperformed. Thus restored, inheritability follows; there being said to be no case in which a man competent to the one is not qualified for the other.—Stra., H. L., Vol. I, p. 156.

Where the exclusion from inheritance is not from natural defects, the cause must have been previous to the division or descent of property; if it did not occur till after, the succession is not divested by it.—*Ibid.*, p. 163.

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* *Vide* Precedents, page 815.

† See *ante*, pages 562—565, and the foot note at page 561.

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sion from inheritance in the case of their existing, and not being expiated by penance at, or before, the time when succession opens.*

Vide Precedents, pp. 780—783.

RAGHU-NANDANA :—Here the destruction of the right of property by reason of degradation is to be understood (to take place) on disinclination to expiation, because the capacity for atonement, which can be performed with one's wealth only, is predicated in the *Shrutis*, even of the degraded.—*Dá. Ta.*, Chap. I, § 11. Authority.

So also SRÍ-KRISHNA TARKÁLANKÁRA, who says,—"The penance of the degraded being heard (to have been ordained) by gift and the like of his whole wealth, here the degraded should be such as is averse to penance; consequently, it must be understood that degradation without inclination to perform expiation is the cause of destroying heritable right.—See his Commentary on the *Dáya-bhága, Suns.*, page 25. Authority.

A person who is afflicted with elephantiasis, and who has not made expiation, *is excluded* from inheritance; but one who made atonement, shall take a share, since the sinful taint is removed; for that was the sole cause of his exclusion. This is accurate; and in like manner, a person afflicted with marasmus is only excluded if he have not made expiation. RAGHU-NANDANA holds, that—expiation for a man afflicted with elephantiasis, or other similar disease, is ordained for the purpose of enabling him to perform acts of religion ordained in the *Veda*; by parity of reasoning, he becomes competent to inherit property, as well as to perform religious ceremonies: it is not found, in any other case, that a son competent to perform obsequies and other acts of religion is not qualified to inherit."—*Coleb.* Dig., Vol. III, p. 305. Authority.

RAGHU-NANDANA says:—"Aversion to penance on the part of the fallen sinner contributes to the forfeiture of his right to his own property. His not being averse to penance contributes to his right in the paternal estate."—*Coleb.* Dig., Vol. III, p. 315.—*Vide* Precedents, page 814. Authority.

An outcast (*patita*), and one addicted to vice (*upa-pátakí*) are excluded if they do not perform penance.—The exclusion again of these takes place if their disqualification occur previously to partition (or succession), but not if subsequently to partition (or succession), for there is no authority for the resumption of allotted shares.—The masculine gender Authority.

* See the Annotation at page 576.

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in the word "outcast," &c., is not intended to be expressive of restriction, and that the law of exclusion based upon defects excludes the wife or the daughters, female heirs as well.—*Víra-mitrodaya*, Chap. VIII, § 3—5.

Vyavasthá. **653**. But as the degradation caused by sanious or ulcerous leprosy or by a crime or crimes attended with loss of caste causing total expulsion from society is removable neither by expiatory penance nor by any other means, the sufferer in the former and the delinquent in the latter* is for ever debarred from inheriting as well as performing the exequial rites. (See *ante*, page 574.)

Vide Precedents, page 783.

Vyavasthá. **654**. If the disease or defect for which a person was deprived of his share at the time of the former owner's death or partition of his estate was subsequently removed by medicaments or otherwise, it is just that he should get his proper share of the estate and forfeit it not, should a like misfortune afterwards befall him.†

Authority. VIJNÁNESHWARA says, "They are debarred of their shares if their disqualification arose before *division* of the property. But one already separated from his co-heirs is not deprived of his allotment."—*Mit.* Inh., Chap. II, Sect. x, § 6.

Remarks. According to the doctrine of the Bengal school, however, the disqualification causing exclusion must have arisen previous to *descent* of the property; and property once vested cannot be divested on account of a subsequent disqualification, not amounting to civil death; inasmuch as the general rule of our law is that—'property, once vested, is not divested without death, natural or civil.' See *ante*, pages 5—14, and Precedents, pages 169, 791, 805.

Authority. SRÍ-KRISHNA TARKÁLANKÁRA :—"Afflicted with an incurable disease."‡—this being heard (said), if after partition (by the other parceners) the diseased be cured by medicine, or other means, he also will share the heritage.—Commentary on the *Dáya-bhága*, *Sans.*, p. 119.

Authority. VIJNÁNESHWARA :—If the defect be removed by medicaments or other means (as penance and atonement §) at a

* See the second foot note at page 581.
† See the Annotation at page 576.
‡ In the text of YÁJNAVALKYA.—See *ante*, p. 561. § BÁLAM BHATTA.

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period subsequent to partition, the right of participation takes effect, by analogy (to the case of a son born after separation.) "When sons have been separated, one, who is afterwards born of a woman equal in class, shares the distribution."—*Mit.* Inh., Chap. II, Sect. x, § 7.

Authority.

Such also is the opinion of NÍLA-KANTHA who says,—"If, after division, virility or the other (absent qualifications) be regained by medicine or other means, the person will then receive his share, as a son born after partition (does).—*Vyav. Mayú.*, Chap. IV, Sect. xi, § 2.

Remark.

The doctrine inculcated in the above passages is quite consistent with reason, and, being so, it ought to be followed in practice in Bengal as well as in the other provinces of India. Because, although a person, having a disqualifying disease or defect at the time of his father's death or before partition of his estate, was debarred from succeeding to the patrimony, yet subsequently upon the cure of the disease or removal of the defect, if his right to perform obsequies and other religious rites was restored, the restoration of his right to inherit was irresistible, inasmuch as the latter is the concomitant of the former, and follows it as a legal consequence.* To keep him even *then* deprived of the heritage, to which he thus became entitled, would be not only inconsistent with the reason of the law, but also contrary to the opinion and practice of venerable persons, and therefore not proper and equitable.† "A decision," says VRIHASPATI,‡ "must not be made solely by having recourse to the letter of the written codes: since, if no decision were made according to the *reason* of the law, there might be a failure of justice."§

Precedent.

Accordingly it has been determined by the late Sudder Court of Bombay that 'if a man or woman be blind or deaf, such gets no share of his or her father's property, but the other co-parceners are bound to maintain him or her. If, however, after the division, the defect be removed, he or she will receive a share, and again, if either misfortune should fall on him or her, after separation, the share received by him or her, does not revert to the other sharers.—*Ravee Bhudr Sheo Bhudr* v. *Roop Shunker Shunkerjee.*—Borr. Rep., Vol. II, p. 656.—Morl. Dig., Vol. I, p. 338.

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* See *ante*, page 577.

† *Vide Dá. Bhá.*, Chap. III, Sect. i, § 22. See *ante*, pages 187 and 252.

‡ One of our legislators. See the Preface.

§ See *Coleb.* Dig., Vol. II, p. 128.

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Vyavasthá.

655. The heritable right of one, who has abdicated secular concerns, or given up his desires for worldly things, becomes extinct just as that of a hermit and the rest quitting the condition of a householder.*

Vide Precedents pages, 8—10, 13, 809.

Authority.

By the extinction of desires is meant the cessation of desires which is not identical with that absence of desire, which may co-exist with the right of property.—*Dá. Ta.*, Chap. I, § 12.

Here it should be remarked that the right of property being once extinguished by reason of the cessation of desires, will not again revive with the revival of desires.—*Ibid.*, § 13.

For further authorities see *ante*, pages 9 and 10.

Annotations.

655. There are two occasions, upon either of which, wherever the Hindú law prevails, dominion may be transferred from the father in his life without his consent, whether the property, claimed by the sons to be divided, be ancestral or acquired. These are voluntary devotion, by which the father is considered as having renounced it, and degradation from caste, by which it is forfeited.—Stra., H. L., Vol. I, p. 184.

655. Another undoubted one is his entry into religion, that is, his assumption of the one or other of two religious orders, by which a *Hindú* is accounted dead in law; the consequence also being the same, that heirs take his estate. They constitute the third and fourth stages in the progressive advancement of the *Hindú*, from birth to death; the first being that of a *student*; the second, that of a married man or house-holder; the third (the first of the two in question, *viz.*,) that of a *hermit* (*Vánaprastha*), for which the appointed age is fifty; the next is that of *anchoret*, (*Sannyási*, or *Yati*.) The order of *anchoret* was left at the beginning of the present (*Kali*) age subsisting, when that of the *hermit* is said to have been abrogated.—Stra., H. L., Vol. I, pp. 185, 186.

655, 656. It will be seen, in a subsequent chapter, that, upon a man's becoming a religious devotee, thus abdicating secular concerns, his property is divisible among his sons, by a sort of anticipated nheritance, as though he were dead; which he is, in effect, in law. Upon the assumption of such an order, respect may be entertained

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* See the Annotation at page 575.

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656. If a man after being excluded from inheritance by reason of entering into another order,* should apostatize, or forsake the same, he will not only be debarred from inheriting,† but also be banished if he is a *Brâhmana*, and reduced to slavery if he is a *Kshatriya* or *Voishya*. *Vyavasthâ.*

KÁTYÁYANA :—Where men of the three twice-born classes forsake religious mendicity, let the king banish a man of the sacerdotal class, and reduce to slavery a man of the military or commercial tribe.—*Coleb.* Dig., Vol. II, p. 227. Authority.

DAKSHA :—If a man after assuming religious mendicity, abide not by his duty, let the king cause him to be lacerated by the feet of dogs, and immediately banish him.—*Ibid.* Authority.

657. Such children or relatives of apostates from a religious order, outcasts, or the like, as are not themselves so circumstanced, are debarred from inheriting only that property which was acquired by the latter *after* their apostacy or degradation.* *Vyavasthâ.*

Vide Precedents, pages 809, 810.

Annotations.

for the act, where it is seen to be sincere. For *apostacy* from it, the Hindú law makes no allowance ; it operates as an exclusion from inheritance, and, with reference to two of the superior classes, *viz.*, the *Kshatriya* and *Voishya*, as a cause of servitude,—apostates, in either of these two classes, becoming, by their apostacy slaves to any master, as may happen by agreement ; and eventually to the king, as some atonement for their offence ; with this peculiarity, that they may be slaves in the inverse order of the classes, that is, to masters of a class inferior to their own ; contrary to the general rule, which is against such a degradation in slavery, as it has been seen to be in marriage. The Brahmin, that highly privileged order, is indeed exempt from it ; who, therefore, if he apostatize, is to be banished, being (says DAKSHA) first caused by the king to be *lacerated by the feet of dogs*.—Stra., H. L., Vol. I, pp. 113, 114.

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* See *ante*, pp. 561, 575.

† It has, however, been declared by Act XXI of 1850, "that so much of any law or usage now in force in India, as inflicted on any person forfeiture of rights of property, or might be held in any way to impair or affect any right of inheritance, by reason of his or her being deprived of caste, should cease to be enforced as law."

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Vyavasthá. **658. The property acquired by an apostate, outcast, or the like, is inherited by such of his relatives as are degraded like himself.**

Vide Precedents, pages, 805, 809, 810.

Authority. It is not proper to affirm, that his property in wealth acquired during his fallen state is forfeited by reason of his degradation. Else a degraded sinner would be always compelled to rob for his subsistence.—*Coleb.* Dig., Vol. III, page 315.

Authority. In like manner incapacity to inherit the grandfather's estate attaches also to the sons of an apostate from a religious order as well as to such other sons as are, by reason of defects, disqualified to inherit.—*Smri. Chan.*, Ch. V, clause 38.

Authority. As to the property of hermit and the rest, their sons and others, born before their entering such orders, are not heirs, so to the property acquired by an outcast or the like *after* his degradation, his sons and the rest, born *before* that event, have no heritable right. The successor to the property of a person degraded or excommunicated must therefore be ascertained like the successor to the property of a hermit and the rest, according to the maxim—"the sense of the law, ascertained in one instance, is applicable in others also, provided there be no impediment."*

Remark. JÍMÚTA-VÁHANA says,—"If a man espouse a woman of superior tribe after marrying one of an inferior class, both marriages are contrary to regular order. The son of either of these women, being *Kshetraja* or issue of the wife procreated by a kinsman authorised to raise up issue to the husband, is unworthy of the inheritance. But a son begotten by the husband himself, being of the same tribe, on his wedded wife espoused in irregular order, is heir to the estate: so likewise is a son begotten by the husband on a wife dissimilar in class but espoused in regular gradation. That is declared by KÁTYÁYANA:—'But the son of a woman, married in irregular order, may be heir, provided he belong to the same tribe with his father: and so may the son of a man belonging to a different (but superior) tribe, by a woman espoused in the regular gradation. The son of a woman married to a man of inferior tribe is not heir to the estate. Food and raiment only are considered to be due to him by his kinsmen. But on failure of them, he may take the paternal wealth. The kinsmen shall not be

* See *ante*, pages 200, 490.

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compelled to give the wealth received by them, not being his patrimony."—*Dá. Bhá.*, Chap. V, § 15, 16. But,—

659. In the present *(kali)* age, marriage with a woman of a different class being prohibited, and such a woman not becoming the wife of the man to whom she is married,* and, in consequence, the son of that woman, whether married in the regular or irregular order, not being held as a son of the man who so married her, and begat him on her, is not entitled to inherit from him. *Vyavasthá.*

660. The sons of those women whom their husbands were prohibited from marrying and whom they are enjoined to desert and perform penance, have no heritable right to the estates of their so-called fathers whose (lawful) sons they could not be by reason of their mothers not becoming wives of those men.† *Vyavasthá.*

661. The illegitimate issue of *Bráhmanas*, *Kshatriyas* and *Voishyas* are excluded from the inheritance of their putative fathers, being entitled to maintenance only.‡ *Vyavasthá.*

Vide Precedents, pages 16, 17.

662. The rules respecting disqualification and disinherison apply to both sexes.§ *Vyavasthá.*

The masculine gender is not used restrictively in speaking of an outcast and the rest. It must be therefore understood, that the wife, the daughter, the mother, or any other female being disqualified for any of the defects, which have been Authority.

Annotations.

659, 660. The remaining cause of exclusion to be noticed is an *incompetent marriage*, that is, where the husband and wife are descended from the same *stock*. Such marriage being incongruous, the issue of it cannot inherit, excepting among *Súdras*. And the consequence is the same, where the marriage has not been according to the order of *class*—*Stra.*, H. L, Vol. I., (Ed. 2d.),p. 165.

662. The general law of disqualification applies alike to both sexes.—*Stra.*, H. L., Vol. I, p. 164.

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* See *ante*, pp. 173, 174..
† See *ante*, pp. 195, 196.
‡ See *ante*, pp. 25, 26.
§ See *ante*, pages 577, 578.

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specified, is likewise excluded from participation.—*Mit.* Inh., Chap. II, Sect. x, § 8.

Vyavasthá. **663.** The sons of the persons incapable of inheriting are, however, entitled to inheritance, provided they themselves be free from the diseases or defects causing exclusion from inheritance.

Vide Precedents, pages 807, 808, 817 818.

Authority, DEVALA :—When the father is dead, an impotent man, a leper, a madman, an idiot, a blind man, an outcast, the offspring of an outcast, and a person wearing the token (of religious mendicity), are not competent to share the heritage. Food and raiment should be given to them, excepting the outcast. But the sons of such persons, being free from similar defects, shall obtain their fathers' share of the inheritance.—See *Dá. Bhá.*, Chap.V, § 11.

Authority. NÁRADA.—One afflicted with an obstinate and agonizing disease, and one insane, blind or lame, from his birth, must be maintained by the family; but their sons may take the shares (of their parents.)—See *Coleb.* Dig., Vol. III, page 303.

Authority. YÁJNAVALKYA :—But their sons whether legitimate or the offspring of the wife by a kinsman (*s*), duly authorized, may take shares provided they have no disability. (*t*)—*Caleb.* Dig., Vol. III, p. 332.

JÍMÚTA-VÁHANA says :—" A possibility exists of an impotent man and the rest, as above enumerated, espousing wives." " If the eunuch and the rest should at any time desire to marry, the offspring of such as have issue shall be capable of inheriting. Issue signifies offspring—It must not be objected how can they contract marriages, since the eunuch not being male, is incapable of procreation, and the dumb man and the rest [or those born deaf or blind] are degraded for want of initiation and investiture, because they are unapt for [the preparatory] study? The eunuch may obtain issue from his wife by means of another man; and a person unfit for investiture with the sacerdotal string is not degraded from his tribe for want of that initiation, any more than a *shúdra*.—Therefore, the sons of such persons, being either their natural offspring or issue raised up by the wife, as the case may be, are entitled, provided they are free from similar defects, to take their allotments according to the pretensions of their fathers".—*Dáya-bhága*, Chap. V, paras. 17—19.

Remark. But sons other than the *Ourasa* (legitimately begotten) and *Dattaka* (given in adoption) are not allowable in the present *(Kali)* age.—See *ante*, pages 276, 277.

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(s) On this text (of YÁJNAVALKYA) commentators remark, that two sons of lepers and the rest, namely, one legally begotten, and one produced by a wife duly authorized, but not their other sons, are capable of inheriting. That is not satisfactory; for the issue of an appointed daughter, the son given, and the rest, are faultless; and the offspring of the wife and the son legally begotten, are not especially mentioned in the texts of MANU and the rest. It should not be argued, that no ground of preference exists whether the text of MANU shall be restricted as bearing the same import with the text of YÁJNAVALKYA, or this be considered as exhibiting instances which elucidate the meaning of the other, "for MANU is superior to all the legislators. Thus VRIHASPATI :—MANU holds the first rank among legislators, because he has expressed in his code the (whole) sense of the *Veda:* no code is approved which contradicts the sense of (any law promulgated by) MANU."—*Coleb.* Dig., Vol. III, pp. 322, 323. Remark.

(t) "Provided they have no disability;"—that is, provided they are free from defects which cause exclusion from inheritance, such as blindness, deafness and the like. "They may take shares;" not a mere maintenance.—*Ibid.*, p. 324. Exposition.

664. The excluded persons,—excepting the outcast or degraded, his issue, the person who has assumed another order and the apostate,—are however, entitled to be maintained by the successor to the estate, which would have been inherited by them had they not been disqualified. *Vyavasthá.*

Vide Precedents, pages 188, 373, 779, 780.

MANU :—But it is just that the heir who knows his duty should give to all of them, food and raiment for life without stint, according to the best of his power: he who gives them nothing, sinks assuredly to a region of punishment. Authority.

Annotations.

664. It appearing, then, that the incapacity to inherit, except in the instance of the *outcast*, is personal merely; that one excluded may be said, in every case, to be entitled to be maintained; and that, in most, it is in his power, at any time, to restore himself to his rights;—whatever may be thought of the wisdom of some of these provisions, it cannot be said that they are universally destitute of justice, or, in any instance, totally devoid of humanity. Nor, in comparing this part of the law with our own, ought we to forget, that the latter has made none, for preventing the absolute disinheriting of children by will.—Stra. H. L., Vol. I, page 164.

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Exposition. The construction of the text—"but it is just that the heir who knows his duty should give to all of them, &c.,"—is this: 'it is just to give all of them, namely, eunuchs and the rest, food and raiment for life.' From the conclusion of the dicta: "sinks assuredly *to a region of punishment,*" it must be inferred, that he who does not willingly give *food and raiment,* shall be compelled to give it.—*Vide Coleb.* Dig., Vol. III, p. 320.

Authority. YÁJNAVALKYA :—An outcast and his issue (*m*), an impotent person, one lame, a mad man, an idiot, a blind man, a person afflicted with an incurable disease, (as well as others similarly disqualified,) must be maintained, excluding them, however, from participation.*

Authority. BOUDHÁYANA :—Persons incapable of transacting business (*u*), blind men, idiots, those who are immersed in vice (*v*), or afflicted by diseases, and even those who neglect their duties (*w*), but not the degraded nor their issue, let the heirs supply with food and apparel.*

Explanation. (*u*) "Persons incapable of (transacting) business:" not become capable of civil transactions.—*Ratnákara.* The terms may be also explained, neglecting civil affairs, and solely devoted to acts relative to another world.—*Coleb.* Dig., Vol. III, p. 317.

Exposition. (*v*) "Those who are immersed in vice:" The term (*Vyasana*) is explained by AMARA, 'danger or calamity, falling low, or erring, vice proceeding from lust, or wrath;' consequently the heir must support those who have fallen off from their duty, that is, who are addicted to gaming and the like; and such as are impelled by vice proceeding from lust, that is addicted to the frequentation of courtezans; and those who are impelled by vice proceeding from wrath, or who always design mischief to others: it follows from the maintenance ordained, that they shall be excluded from participation.—*Ibid.*, p. 317.

Explanation. (*w*) "Those who neglect their duties,"—that is, who are disqualified for acts of religion, such as sacrifice and the like; or, those who perform not the ceremonies enjoyed at morning and evening twilight, and at noon, nor other daily acts of religion.—See *Ibid.*

Remark. Although they be excluded from participation, they ought to be maintained, excepting, however, the outcast and his son. That is taught by DEVALA.—*Dá. Bhá.* Chap. V. §, para.—11.

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* *Coleb.* Dig., Vol. III, pp, 316 and 321.—*Vide Dá. Bhá.*, Chap. V, § 10, 12.

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DEVALA :—When the father is dead [as well as in his lifetime,] an impotent man, a leper, a mad man, an idiot, a blind man, an outcast, the offspring of an outcast, and a person fraudulently wearing the token [of religious mendicity,] are not competent to share the heritage: food and raiment should be given to them, excepting the outcast.—*Dá. Bhá.*, Chap. V, § 11. Authority.

VASHISHTHA, by indirect expressions, shows that four classes of persons are not entitled to be maintained. "Those who have assumed another order are excluded from inheritance, as also those that are impotent, mad, or degraded. The impotent and mad are, however, to be maintained."—*Smri. Chan.*, Chap. V, Cl. 29.—See *Vyav. Mayú.*, Chap. IV, Sect. xi, § 10. Authority.

This text indicates the exclusion of an outcast and of one who has assumed another order from maintenance in virtue of the maxim that "of several things, if a quality be ascribed to a few particularly, it is necessarily inferable that the others are devoid of that quality." As, without entering into a religious order, there can be no apostacy from a religious order, it follows by saying that one who has assumed another order is not entitled to be maintained, that an apostate from a religious order is also likewise excluded from maintenance.—*Ibid.*, Cl. 30. Exposition.

The conclusion hence is that a maintenance is necessary to be given to all excluded from inheritance, with the exception of the following four—1, an outcast; 2, his issue; 3, one who has assumed another (*i. e.*, a religious) order; 4, an apostate from a religious order.—*Ibid.*, Cl. 31. Conclusion.

KÁTYÁYANA :—Food and raiment *without stint, i. e.*, for life, are considered to be due to him by his kinsmen. (*x*)—But on failure of them, he may take the paternal wealth. The kinsmen shall not be compelled to give the wealth received by them, not being his patrimony.—*Smri. Chan.*, Chap. V, Cl. 23. Authority.

(*x*) "His Kinsmen" means the kinsmen of him who is excluded from inheritance.—*Ibid.* Explanation.

The meaning is, that MANU and others consider that food and raiment are to be supplied to him who is excluded from inheritance by those who take his father's wealth. The meaning of the last sentence ['the kinsmen, &c.,'] of the text is, that where kinsmen have not taken the estate of the father of one who is excluded from inheritance, they are not to be compelled by the king to pay him maintenance. The rule hence settled is that— Exposition.

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Vyavasthá. **665.** It is not necessary for kinsmen, who have not taken the patrimony of one excluded from inheritance, to maintain such person.*

Vyavasthá. **666.** Maintenance should be supplied not only to the persons excluded from inheritance, but also to their unmarried daughters until they be disposed of in marriage, and also to their childless wives, if chaste.

Authority. YÁJNAVALKYA:—Their daughters must be maintained likewise (*y*) until they are provided with husbands.—Chap. II, verse 142.—*Dá. Bhá.* Chap. V, § 19.

Exposition. (*y*) "Their daughters, or the female children of such persons, must be supported, until they be disposed of in marriage." Under the suggestion of the word "likewise," the expenses of their nuptials must also be defrayed.—*Mit.* Inh., Chap. II, Sect. x, § 13.

Authority. YÁJNAVALKYA:—Their childless wives, conducting themselves aright, must be supported; but, such, as are unchaste, should be expelled; and so indeed should those who are perverse.—Chap. II, *v.* 143. See *Dá. Bhá.*, Chap. V, para. 19.

Remark. According to the following expositions of the above text, maintenance must be provided to the woman who is perverse, though she should be turned out of doors.

Exposition. The wives of those persons, being destitute of male issue and being correct in their conduct, or behaving virtuously, must be supported or maintained. But, if unchaste, they must be expelled; and so may those, who are perverse. These last may indeed be expelled: but they must be supported, provided they be not unchaste. For, a maintenance must not be refused solely on account of perverseness.—*Mit.* Inh., Chap. II, Sect. x, para. 15.

Exposition. If she be *unchaste*, a woman must be turned out of doors, and without a maintenance. A perverse woman also should be turned out of doors, but a maintenance must be provided for her, according to MADANA and others.—*Vyav. Mayú.*, Chap. IV, Sect. xi, § 12.

Vyavasthá. **667.** Not only the unchaste wives and widows of the disqualified persons as above, but the

* *Smri. Chan.* Chap. V, Cl. 25.

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unchaste wives and widows in general, forfeit their right to maintenance, as well as to inheritance.*

Vide Precedents, pages 23, 24, 200—204, 372, 786, 791.

NÁRADA:—Let the brothers allow maintenance to his (the deceased's) women for life, provided these preserve unsullied the bed of their lord; but if they behave otherwise, the brethren may resume that allowance.—*Mit.* Inh., Chap. II, Sect. i, § 7. Authority.

668. The unchaste daughter, mother and the grandmother share the same fate as an unchaste widow.* *Vyavasthá.*

Vide Precedents, pages 200—204, 810.

Inasmuch as their right to inheritance or to maintenance is weaker than, or inferior to, that of a widow, and the word '*patní*' (wife or widow) being employed with a general import to embrace all the females that are entitled to inherit, whatever restrictions and privations are ordained in regard to a widow, are applicable also to daughters and other women who, if not disqualified, are entitled to inherit or to be maintained.* Reason.

669. It should, however, be observed that the woman who was adulterous at the time when succession opened, or who previously committed adultery which remained unexpiated by penance, forfeits her right to maintenance as well as to inheritance; and not she who was previously adulterous, but ceased to be so, and expiated or was about to expiate the sin by penance, before or about the time of succession. *Vyavasthá.*

Vide Precedents pages 372, 786—804, 810.

Because, her right to peform obsequies and other religious acts being restored by expiation, that to the inheritance or maintenance which is a concomitant of the former would follow as a legal consequence.† Reason.

670. But if the crime be so heinous as to cause complete degradation with expulsion from society; or loss of caste unredeemable by penance, then no expiatory penance would restore the right as above.† *Vyavasthá.*

Vide Precedents, pages 783, 786.

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* See *ante*, pages 36, 66, 77, 78. † See *ante*, page 577.

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Authority. YÁJNAVALKYA :—From disloyalty (in thought) a woman is purified by courses; but in case of conception by *unlawful commerce,* desertion is enjoined by the law; and so in the case of her destroying an embryo, or slaying her husband, or committing any sin in the first degree.—*Coleb.* Dig., Vol. II, page 422.

Authority. Wives of *Bráhmanas, Kshatriyas,* and *Voishyas,* approached by a man of the servile class, are purified by penance, provided they bring forth no children *by such commerce;* but not otherwise.—*Mitákshará, Achárádháya* (*Sans.*), p. 423.

On the other hand,—

Vyavasthá. **671.** If a woman after inheriting property or receiving maintenance become unchaste, then she would forfeit her right to it only in the case of her crime occasioning civil death, and not otherwise.

Vide Precedents, page 791.

Reason. Inasmuch as the general rule of our law is that, "right once vested is not divested, except by death, natural or civil."*

* See *ante,* pages 5—14 and Precedents, pp. 169, 791, 805.

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BOOK V.

ON MINORITY, GUARDIANSHIP, CONTRACTS, &c.

CHAPTER I.

ON MINORITY AND GUARDIANSHIP.

SECTION I.

ON MINORITY.

672. Agreeably to the law as current in Bengal, the end of the fifteenth year is the limit of minority.* *Vyavasthá.*

Vide Precedents, pages 821, 822, 839. Note.

NÁRADA and KÁTYÁYANA :—An infant (*shishu*) before his eighth year, must be considered as similar to a child in the womb; until his sixteenth year (*a*) he is called *bála* (minor) and also *poganda* (adolescent) : afterwards [(*b*) he is considered as] acquainted with civil affairs (or adult in law.)—*Vyavahára-tattwa.* *Vide* Coleb. Dig., Vol. II, p. 125. Authority.

(*a*) "Until his sixteenth year," signifies to the nearest limit of his sixteenth year: consequently he is a minor until the close of his fifteenth year.—*Ibid.*, Vol. I, p. 300. Exposition.

Infancy extends to the fifth year ; childhood is limited to the tenth; adolescence continues to the sixteenth year, when puberty commences.—A text cited by SRÍ-DHARA SWÁMÍ.—*Ibid.*, page 300. Authority.

Authors agree that minority extends to the end of the fifteenth year, and that until that time the minor is called '*bála*;' but they differ in giving him the other names at particular periods of his age during minority. Thus in the text of NÁRADA and KÁTYÁYANA, he is denominated '*shishu*' to the eighth year; and he is called '*bála*,' as well as '*poganda*' till the sixteenth year of his age. In the text cited by SRÍ-DHARA SWÁMÍ, he is called '*kumára*' till the fifth year, '*poganda*' till the tenth, and '*kishora*' to the end of the fifteenth year: after that his puberty commences. JAGAN-NÁTHA alluding to the text of KÁTYÁYANA above cited, says as follows :—"Under Remark.

* *Vide* SRÍ-KRISHNA'S Commentary on the *Dáya-bhága* (Sans.) page 58, and Macn. H. L., Vol. I, p. 103.

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eight years, or before the commencement of his eighth year, he is an infant *(shishu:)* and he is also a *minor*, (but) distinguished (from an adolescent.) Another is also distinguished, called a young infant *(kumára)* to the commencement of his fifth year; agreeably to the same text cited by RAGHU-NANDANA, infancy extends to the fifth year. The use of this distinction regards penance or expiation and the like. But here minority must be taken to the end of the fifteenth year; and this must be understood of a computation by vulgar and *sávana* time from the day of his birth. Afterwards he is adult or competent to (manage) affairs.*

Authority. Minority (extends) to the sixteenth year, according to this text of NÁRADA: "One is a minor *(bála)* until the sixteenth year *(á-shorashát barshát)*."—KULLÚKA BHATTA'S Commentary on MANU'S *Shloka*, 27, Chap. VIII.

(b) The Sanscrit word rendered by the term 'afterwards' is '*paratah*,' which here means *after* the age, during which a child is *bála* or *poganda*, that is, until the age of sixteen. And the Sanscrit words rendered by the phrase 'until the sixteenth year,' are '*á-shorashát barshát*,' the enclitic particle '*á*,' prefixed to the word '*shorashát*' (sixteen) signifying '*until, till, to, up to*,' or '*as far as*,' is used in the sense of *maryyádá* (limit, whence,—exclusive), as well as *abhi-vidhi* (inclusive). The Bengal authorities having used the above particle in the sense of *maryyádá* (exclusive), minority, according to their doctrine, extends to the sixteenth year exclusive, that is, to the end of the fifteenth year; while, according to the authorities of the other schools, it ceases on the expiration of the sixteenth year, or on the seventeenth birth-day; they having used the above particle in the sense of 'inclusive *(abhi-vidhi)*.'

Remark. It has, however, been recently enacted by the British Government, that—"subject as aforesaid, every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Indian Succession Act, (No. X of 1865), or in any other enactment, be deemed to have attained his majority when he shall have *completed his age of twenty-one years, and not before*."—Indian Majority Act 1875, Sect. iii, para. 1.

"Subject as aforesaid, every other person, domiciled in British India, shall be deemed to have attained his majority

* Mr Colebrooke says, "This distinction may be thus recapitulated: 'a minor (*bála*) is in early infancy to the end of his fourth year, called *kumára*, in law, he is an infant to the end of his seventh year, and in this period of his life is called *shishu*, he is called a boy (*poganda*) from his fifth to the end of his ninth year; and his adolescence *(kishora)* terminates from the tenth to the end of his fifteenth year.'—Dig. Vol. I, (Cal. Ed. page 300.

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when he shall have completed his age of *eighteen years, and not before.*"(1)—*Ibid.*, para. 2.

"In computing the age of any person, the day on which he was born is to be included as a whole day, and he shall be deemed to have attained majority, if he falls within the first paragraph of Section 3, at the beginning of the twenty-first anniversary of that day, and if he falls within the second paragraph of Section 3, at the beginning of the eighteenth anniversary of that day."

The exceptions alluded to by the expression "subject as aforesaid," are the following:—

"Nothing herein contained shall affect—

(*a*) "The capacity of any person to act in the following matters (namely,)—marriage, dower, divorce, and adoption.

(*b*) "The religion or religious rites and usages of any class of Her Majesty's subjects in India, or

(*c*) "The capacity of every person, who before this Act comes into force, has attained majority under the law applicable to him.

"This Act may be called 'The Indian Majority Act, 1875.'

"It extends to the whole of British India, and, so far as regards subjects of Her Majesty, to the dominions of Princes and States in India in alliance with Her Majesty."

673. A minor is incompetent to do any civil act, which, if done by him, is null, or revocable and voidable.* *Vyavasthá.*

Vide Precedents, pages 819—824, 829.

Annotations.

(1) The age of the party may be ascertained and established by the personal inspection of the Judge. *Aswudda Narayana Sastri* v. *Luchmi Ammal and another.* Mad. Sud. R, for 1860, p. 87. On a *habeas corpus case, in re Mooniatta,* reported in the Madras Native Herald for 1847, p. 193, before Sir William Burton, in the late Supreme Court, the Judge ordered an inspection by a medical man, to ascertain the girl's age, and declared her an infant thereon. Norton's Leading Cases on the Hindú Law, Part I, page 114.

673. Infancy has been said to be complete legal disability, affecting all the acts of the infant.—*Ibid.*

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Authority. MANU:—A contract made by a person intoxicated, or insane, or grievously disordered or wholly dependent, by an infant, or a decrepit old man, or (in the name of another), by a person without authority, is utterly null.—See *Coleb.* Dig., Vol. II, p. 193.

Authority. YÁJNAVALKYA:—A contract made by a person intoxicated, or insane, or grievously disordered, or disabled, by an infant, or a man agitated by fear or the like, or, (in the name of another,) by a person without authority, is utterly null. See *Ibid.*

Authority. KÁTYÁYANA:—What has been given under the impulse of lust or anger, or by any such as are not their own masters, or by one diseased or deprived of virility, or inebriated, or of unsound mind, or through mistake, or in jest, may be taken back.—*Ibid.*, p. 187.

Authority. VRIHASPATI:—What is given by a person in wrath or (excessive) joy or through inadvertence, or during disease, minority or madness, or under the impulse of terror, by one intoxicated, or extremely old, or by an outcast or an idiot, or by a man afflicted with grief or with pain, or what is given in sport, all this is declared ungiven or void.—*Coleb.* Dig., Vol. II, p. 197.

Authority. NÁRADA:—What has been given by men agitated through fear, anger, lust, grief, or (the pain of) an incurable disease, or as a bribe, or in jest, or by mistake, or through any fraudulent practice, must be considered as ungiven;—So must any thing given by a minor, an idiot, a (slave or other) person not his own master, a diseased man, one insane, or intoxicated, or in consideration of work unperformed.—*Mitákshará (Sans.)*, p. 261. See *Coleb*, Dig. II, p. 181.

It is owing to this civil disability that—

Vyavasthá. **674. A minor can neither be sued and summoned to answer a suit, nor arrested for a debt: he**

Annotations.

So an infant cannot make a Will.—*Baman Dass Mookerjea* v. *Mussummat Tarini*, 7. Moore's I. A., pp. 193, 196. *Hurro-soondry Dossee* v. *Cossi-nauth Bysack.* Macn. Cons. H. L., p. 2. 2, Morl. Dig., p. 198. See Sir F. Macn., p. 78.—Norton's Leading Cases on the Hindú Law, Part I, p. 115.

674. According to NÁRADA, and many other authorities, a minor can neither be arrested, nor summoned to answer a suit: and a trial, in which a minor or insane person is plaintiff or

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can only sue or defend by his guardian, next friend, or well-wisher.

Vide Precedents, pages 842, 843.

NÁRADA:—Let not the king cause to be summoned persons in a weak state, nor minors, old men, persons in danger, those actually employed in religious offices, immersed in (worldly) business, those overcome with desire or habitual estrangements, nor persons employed on the duty of the king or of the gods (*utsava*).—*Vyav. Mayú.*, Chap. I, Sect. i, § 17. Authority.

VRIHASPATI:—Relations, or any other man duly appointed, may undertake the plea, or answer, for persons (weak in mind or body), idiots, mad men, old men, minors, and sick people.—*Vyav. Mayú.*, Chap. I, Sect. i, § 21. Authority.

VYÁSA:—Let friends or relations, as well as servants appointed, institute or defend suits, (in behalf) of women of rank, minors, insane persons, idiots, and sick people.—See *Vyavahára-tattwa*, (*Sans.*), p. 7. Authority.

675. During his minority, one is not bound to pay the debt of his ancestor, even though he has inherited his assets, but on attaining majority he must pay the same,* and be bound by all the proper acts done his behalf by his guardian. *Vyavastha.*

Vide Precedents pages 829, 830, 839, 841, 844, 845, 847.

Annotations.

defendant, is pronounced to be wrong by the *Mitákshará* and other Commentators on YÁJNAVALKYA.—Colebrooke's Opinion. See *Stra.*, H. L., Vol. II, p. 72.

674. During his minority, he the minor may sue or defend by his guardian; who, for abuse of his trust, is removable.—*Stra.*, H. L., Vol. I, p. 80.

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* Alluding to the payment of debts out of the ancestral estate inherited by a minor, Sir William Macnaghten observes: "Where, owing to a son's minority, the father's assets are taken in charge by another person, such person can-not legally apply any portion of the assets to the payment of the father's debts; and that it is only where a person succeeds to property in his own right, that he is at liberty to pay the debts of the ancestor by means of such property. A guardian may, indeed, dispose of a portion to meet the necessity arising for the minor's subsistence, but no necessity can by possibility arise for disposing of any portion to pay the minor's father's debts, for he must cease to be a minor before he can be liable. Nor does there appear to be much hardship in this rule. The provisions of the English law savour of much more hardship; for according to it, the real estates are not subject at all to the payment of debts by simple contract, unless made so by Will."—(Macn., H. L., Vol. I., pp. 110, 111.)—This observation of the learned

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Authority. KÁTYÁYANA :—On the death of the father, (his debt) shall in no case be paid by his sons incapable from nonage of conducting their own affairs; but at their full age, they shall pay it in proportion to their shares; otherwise they shall dwell hereafter in regions of horror.—*Coleb.* Dig., Vol. I, (Cal. Ed.), pp. 298, 299.

Authority. NÁRADA :—Even though he be independent (*d*), a son incapable from nonage of conducting affairs is not (immediately) liable for debts.—*Ibid.*

Explanation. (*d*) 'Independent;'—separate. It is consequently intimated, that there is no other person, such as undivided brothers and the rest, amenable for the payment of that debt. He who has neither father, nor mother, is also deemed independent.—*Ibid.*

Authority. NÁRADA particularly says, a minor is not to pay a debt even when he is independent.—*Vi. Chi.*, p. 35.

Vyavasthá. **676.** But although a minor is not bound to pay the temporal debts of his father or other ancestor whose property he has inherited, yet when of such age as to be conscious of his own doing, he (the minor) is bound, as well as competent, to pay the spiritual debts he owes to such ancestor; that is, to perform his *shráddha* and other rites, and to make proper gifts and payments required for the completion thereof; he can also perform such other acts as are indispensably necessary according to religion, and a contract for necessaries is binding on him. (See the *Shráddha-tattwa* and the *Shráddha-viveka.*)

Vide Precedents, page 820.

Remark. Even a minor makes presents on the eleventh day after his father's death: though given by a minor, they are legal gifts: his sense being unripe, the donation may be made by instruction from others, as he is taught to play at ball or the like.—*Coleb.* Dig., Vol. II, p. 192. And,—

Vyavasthá. **677.** Although a minor is incompetent to give any thing (except for purposes as above), yet he can receive what devolved or was bestowed on

writer is no doubt according to the Hindú law, but it having been laid down by Sir William Jones that 'assets may be followed in the hands of any representative,' this principle has ever since been followed in practice, and guardians are therefore appointed to minors; and sometimes it so happens that the estates inherited by them are sold *in toto* for the liquidation of their fathers' debts.

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him, and the property so received, as well as his other property, should be deposited, free from disbursement, in the hands of his kinsmen and friends,* or any how protected by the sovereign.

Vide Precedents, pages 842—844.

KÁTYÁYANA :—Let them deposit, free from disbursement, in the hands of kinsmen and friends, the wealth of those who have not attained majority; as well as of those who are absent.—*Coleb.* Dig., Vol. I, (Cal. Ed.) pp. 268, 299. Authority.

678. If able to judge and to understand the effect of the act, a minor can give consent to the appointment of his guardian selected for him by another, and the guardian so appointed by the ruling power is to do all that the minor himself could not do by reason of nonage. *Vyavasthá.*

679. Any civil act done by a minor, or during his minority, would be effective if ratified by him expressly or by implication, after his coming of age. (See *Vyavasthá* 691.) *Vyavasthá.*

Vide Precedents, pages 822—825.

Annotations.

678. Although the appointment of a guardian universally rests with the ruling power, yet in the selection of a guardian, the minor himself, if of competent understanding, should be consulted as well as his kinsmen who are his well-wishers.

678. But it should be here remarked that the property of a minor should be entrusted to heirs, and the rest appointed with his concurrence; or, if the infant be absolutely incapable of discretion, with the consent of a near and unimpeachable friend, such as his mother and the rest.—*Coleb.* Dig., Vol. III, p. 543.

If of competent understanding, the concurrence of the minor himself is not to be disregarded, all which only shows how much the choice is a matter of sound discretion.—Stra., H. L., Vol. I, page 72.

678. A minor who has attained the age of discretion though not considered, in the eye of the law, as having attained majority, is competent to adopt a son.

A minor widow can adopt a son if authorized by her late husband.†

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* See *ante*, pages 479, 480. † See *ante*, pages 303, 304.

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SECTION II.

On Guardianship.

Vyavasthá. **680.** The Sovereign (*a*) being the legal guardian or universal superintendent of those who cannot take care of their persons and property, it rests with him to take care of, and look after, the persons and property of minors until they attain majority.

Vide Precedents pages 825, 843, 844.

Explanation. (*a*) "*The Sovereign*," that is, the ruling power itself, or the authority representing the Sovereign, or the Court exercising this branch of his prerogative.

Authority. Sankha & Likhita:—Let the king protect the effects of the infants who are incapable from nonage of conducting their own affairs, and the goods belonging to widows, of learned priests, and of valiant soldiers; but the effects of which there are no owners escheat to the king.—*Coleb.* Dig., Vol. III, p. 542.

Authority. Manu:—The king should guard the property which descends to an infant by inheritance, until he return from the house of his preceptor, or until he has passed minority.—See *Coleb.* Dig., Vol. III, p. 542.

Explanation. Wealth which descends to an infant by inheritance and becomes the property of the minor, let the kind guard, that is, let him protect it from the (*other*) heirs.—The *Ratnákara.*—*Vide Ibid.*

Authority. Boudháyana, treating of the succession of sons, (says):—"Their shares, if they be incapable from nonage of conducting their own affairs, let the king keep carefully guarded, together with the accumulation on those shares, until the minors arrive at *years* of discretion.—*Coleb.* Dig., Vol. III, page 543.

Annotations.

678 680, 683. The ruling power is, in every instance, whether the natural or legal guardians be living or dead, to be the legitimate and supreme guardian of the property of all minors, whether male or female.—Macn., H. L., Vol. I, p. 104.

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If the proprietor be dead, and his sons choose to make a partition of his estate, the king being informed by the minor or by another kinsman, or by his own officer, must himself, or through some person appointed by him, keep the share of the minor, until he attain the age of sixteen years. In like manner, the expenses and other matters should be superintended by the king himself, or by a person appointed by him.—*Ibid.* Exposition.

These and other points may be argued from the reason of the law. Again, if the minor have no brother, the whole estate should be nevertheless guarded in a similar manner; for the reason of the law is the same.—*Ibid.* Exposition.

681. A father is the legal, as well as natural, guardian of his minor children. So, if not disqualified, he can, of his own authority, assume the guardianship of his minor children, excepting, however, in the matter or case which may be between them on the one part, and himself on the other.* *Vyavasthá.*

Annotations.

681—686. A father is recognised as the legal guardian of his children where he exists; and where the father is dead, the mother may assume the guardianship; but where the duties of a manager and guardian are united, she is, in the exercise of the former capacity, necessarily subject to the control of her husband's (male) relations; and with respect to the minor's person likewise there are some acts to which she is incompetent, such as the performance of the several initiatory rites, the management of which rests with the paternal kindred.† In default of her, an elder brother of a minor is competent to assume the guardianship of him. In default of such brother, the paternal relations are generally entitled to hold the office of a guardian, and failing such

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* See the annotations in the following page.

† Although the above is according to the spirit of the law, yet as the necessity of a mother's being subject to the control of her husband's relations, in the matter of managing the affairs of her minor child, has not been strictly enjoined by the present Courts of Justice, it has at present become quite optional with her to be or not to be under the control of her husband's relations in the exercise of her duties as guardian and manager of her infant child. In practice, too, it is seen that mothers do act as guardians, and manage the estates, of their minor children independently of their husbands' relations. As respects the performance of the minor's initiatory rites, that does not compel the mother to be under the control of her husband's relations, but that she is to perform them by, or through, such a relation.

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Vyavasthá. **682.** In default of the father, the mother,* as the natural guardian of her children, can also, of her own authority, assume their guardianship, provided she be not unfit or unqualified for that office.

Vide Precedents, pages 825—827, 829, 830, 839—842.

Vyavasthá. **683.** In default of parents, or (if necessary,) even during the existence of any of them, a guardian may be appointed by the ruling power.

Vide Precedents, pages 825.

Vyavasthá. **684.** In the appointment of a guardian for a minor, his paternal kinsmen, if qualified for the

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Annotations.

relatives, the office devolves on maternal kinsmen according to their degree of proximity. But the appointment of guardian eventually rests with the ruling power.—Macn., H. L., Vol. I, p. 103.

681, 682. A father is the natural guardian. If he neglect his duties, the mother may act.—*Baee Gunga* v. *Mundas.*—Bellas: p. 16. 2. Morl. Dig. N. S., p. 175, § I.—Norton's Leading Cases, Part I, page 118.

682. It is stated that in practice the mother is the guardian, but as a Hindú widow is herself subject to the same sort of tutelage, it is more correct to regard her as proper, if capable, to be consulted on the appointment of one.—*Stra.* H. L. Vol. I, p. 72.

680, 683. With respect to the relation of *guardian* and *ward,* the king as he is by the Hindú law, failing all others, the ultimate heir of all, Brahmins excepted, so is he to an extent beyond what is recognized by us in our Court of Chancery, the universal superintendent of those who cannot take care of themselves. In this capacity, it rests with him, *i. e.,* with the judicial power exercising for him this branch of the prerogative, to select for the office the fittest among the infant's relations, preferring always the paternal male kindred to a maternal ancestor.—*Stra.* H. L., Vol. I, p. 71.

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* And this had been held to include the step-mother whose right of guardianship was declared to be superior to that of the minor's paternal uncle.—Bombay Reports, Vol. II, page 144—Macn., H L., Vol. I, p. 103.

See, however, the case cited at page 827 of Part II of this work, in which a paternal grandmother is considered entitled to be the guardian of her insane son's infant daughter in preference to the infant's step-mother.

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office, should be preferred to others, and even among them the nearest is preferable to the rest.

Vide Precedents, pages 827 & 828.

Inasmuch as the former are enjoined by the law to take care of their infant relative's property. Thus— Reason.

KÁTYÁYANA declares, that kinsmen must guard the property of an infant.—*Coleb.* Dig., Vol. III, p. 544. Authority.

KÁTYÁYANA :—Let all the co-heirs guard the share of an absent parcener; but if a man die leaving an infant son, his wealth must be preserved entire by his kinsmen; and they may divide it in due proportions after the minor has passed adolescence.*(b)*—*Ibid.* Authority.

(*b*) Consequently, the share of the minor must be preserved during his adolescence by kinsmen, like the allotment of an absent parcener, for the reason of the law is the same. In like manner, the king, or kinsmen appointed by him, should guard the minor's property, received from his brothers as his share of the inheritance.—*Ibid.* Explanation.

JAGAN-NÁTHA further says :—" In practice, a mother is the guardian of a minor and of his property, and that is proper, if she be capable *of protecting the ward*; but being a woman, she is under the control of her husband's mother and the rest: still the effects of the widow and of the grandson must be guarded; and since the mother-in-law is a woman, she requires the aid of another kinsman; and he should be selected with the concurrence of the paternal grandmother, and be approved by the king; for the paternal grandmother best knows who among the kinsmen is skilled in the conduct of affairs, and the king is an universal superintendent; and if the widow be old, and capable of governing her own conduct, there is no harm in permitting the estate to be guarded by a kinsman selected by her; for it is only directed that a widow and the rest shall guard the property by any *possible* means."—*Coleb.* Dig., Vol. III, p. 544. Remark.

The grades of the paternal kinsmen, who upon being qualified are to be preferred to the maternal relations and others, is as follows :—

685. In default of the mother, the qualified elder brother is considered to be the natural guardian of his minor brother; in his default, the other qualified agnates are, according to the degree of proximity, entitled to be appointed to the office of a guardian. *Vyavasthá.*

Vide Precedents, pages 825, 827, 828, 829.

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Vyavasthá. **686.** Failing such relations, the guardianship devolves on the maternal relations, the nearest and best qualified of them being preferable to the rest.

Vide Precedents, pages 827, 840, 844.

Vyavasthá. **687.** The guardianship of a female until she be disposed of in marriage, rests with her father: if he be dead, with her qualified paternal relations in the order of proximity; after her marriage, the husband is her guardian, failing him, his heirs, and in their default, his kinsmen; failing them, her paternal and maternal relations are her guardians according to fitness as well as proximity of the degree.

Vide Precedents, pages 827, 840 & 844.

In fact, a female is always under tutelage. Thus—

Authority. MANU:—In childhood must a female be dependent on her father; in youth, on her husband: her lord being dead, on her sons; if she *have no sons, on the near kinsmen of her husband; if he left no kinsmen, on those of her father; if*

Annotations.

687. The guardianship of a female (whether she be a minor or adult), until she be disposed of in marriage, rests with her father: if he be dead, with her nearest paternal relations. After her marriage, a woman is subject to the control of her husband's family. In the first instance, her husband is her guardian, in default of him, her sons, grandsons, and great-grandsons are competent to assume the guardianship; and in default of them, her husband's heirs generally, or those who are entitled to inherit his estate after her death, are competent to exercise the duties of a guardian over herself and her property. On failure of her husband's heirs, her paternal relations are her guardians; and failing them, her maternal kindred. In point of fact, females are kept in a continual state of pupilage.—Macn., H. L., Vol. I, p. 104.

The ruling power is, in every instance, whether the natural and legal guardians be living or dead, recognized to be the legitimate and supreme guardian of the property of all minors, whether male or female.—*Ibid.*

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*she have no paternal kinsmen, on the Sovereign:** women must never seek independence.†—Chapter V, verse 148.

NÁRADA:—When the husband is deceased, his kin are the guardians of his childless widow. In the disposal and preservation of property, as well as in her maintenance, they are her lords, but if the husband's family become extinct, or contain no male, or be helpless, the kin of the widow's father are her guardians, if there be no relations of her husband within the degree of *sapinda*.—See *ante*, page 50. Authority.

Minors being under the protection of the law, favoured in all things which are for their benefit, and not prejudiced by any thing to their disadvantage,—

688. Guardians of minors are to protect and preserve the estate of their wards: they cannot do any thing injurious to their interest, but only what is necessary or beneficial to them. *Vyavasthá.*

Vide Precedents, pages 829, 830, 837, 838, 841, 842, 844—847.

689. A guardian can dispose of or settle his ward's estate to meet a necessity arising for the *Vyavasthá.*

Annotations.

688, 689. A guardian is bound to show *optima fides* in every transaction on behalf of his ward. *Ram Lekhraj Singh* v. *Goury Sunker*, 2. Wyman c. r., p. 23. He is bound to show that he acted

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* The words in italics are not in the original text, but are supplied by Sir William Jones from the Commentaries of KULLÚKA BHATTA, who also is a high authority. See Preface to MANU, page 15.

† A few words will suffice to assimilate the condition of the sex among the old Romans. "*Mulieres omnes*," says Cicero, "*propter infirmitatem consilii, majores in tutorum potestate esse voluerunt*".—Cic. Pro Muren., 11.

Livy, to the like effect:—"*Nullam ne privatum quidem rem agere fœminas sine auctore voluerunt; in manu esse parentûm, fratrum, Virorum.*"—Liv. XXXIV, 2.

It was the same before them with the Greek women; nor can these strictures in this respect be better closed, than by the following extract from a late elegant little work on the States of ancient Greece, whose institutions the Romans copied; exhibiting, with regard to vassalage of the sex, the substance of many a text of MANU, and yet not a perfect picture of it, as it existed at the time to which the account refers. Speaking of the Athenian women, in an age too of refinement, "They lived (says the learned ingenious author) in a remote quarter of the house, and were never allowed to mingle in society with the men. They were not permitted to go abroad, without being attended by a slave, who acted as a spy upon their conduct. They were given in marriage without their consent; and were expected to make the care of their families the sole object of their attention." (Hill's Essays on the Institutions, &c., of the States of Ancient Greece, p. 266.)—*Stra.*, H. L., Vol. I, pp. 252, 253.

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subsistence of the minor and of those members of the family who must be supported out of the estate; and also for any act the performance whereof is quite necessary or actually advantageous to the minor.

Vide Precedents, pages 829, 830, 837, 838, 841, 844–847.

Vyavasthá. **690.** A kinsman or next friend, whether delegated or not, may, like a guardian, institute and defend suits for a minor.

Vide Precedents, pages 838, 841—843.

Authority. VYÁSA:—Kinsmen may institute or defend suits for women, minors, idiots, and sick men: servants appointed may do the same.—Cited in the *Vyavahára-tattwa* and other law treatises.

Authority. VRIHASPATI:—Relations or any other man, duly appointed, may undertake the plea or answer, for persons weak (in mind or body), idiots, mad men, old men, women, minors, and sick people.—*Vyav. Mayú.*, Chap. I, Sect. i, § 21.

Vyavasthá. **691.** On reaching majority a minor is answerable for the debts contracted for necessary purposes

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Annotation.

in all transactions of sale, borrowing, mortgage, and the like on considerations of necessity and advantage, and not on calculation of a possible benefit to the infant. *Ib.* By application of these tests, it will generally be a matter of no difficulty to determine whether or no any particular transaction by a guardian on behalf of his ward ought to be upheld or the reverse. Thus debts for necessaries contracted for him by his guardian bind him. (2. Macn., p. 289.) A conveyance by a guardian must be shown to be for the minor's benefit.—Norton's Leading Cases, Part I, pp. 118 & 119.

690. He (a minor) may sue through his guardian, or *prochein amy*: VYÁSA and VRIHASPATI, (cited in many compilations,) having declared that a kinsman may institute and defend suits for a minor, a woman, an idiot, or insane person, &c.; upon which commentators have observed that, whether delegated, or not, a well-wisher of persons, so incapacitated, may plead on their part.—Colebrooke's opinion. See *Stra.*, H. L., Vol. II, page 79.

691. During his minority, he may sue, or defend by his guardian, who, for abuse of trust, is removable.—*Stra.*, H. L., Vol I, page 72.

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or for his advantage, and is bound by the proper acts done on his behalf by his guardian or manager, as well as competent to question the improper acts done by him, and to sue for anything that was omitted by him through ignorance or negligence.

Vide Precedents, pages 837, 841, 845—847.

692. A guardian must render accounts in respect of the property he was in charge of, is responsible for his acts, and removable for abuse of his trust, or for misconduct. *Vyavasthá.*

Vide Precedents, pages 845—847.

Annotations.

692. If a guardian abuse his trust, no doubt, he should be removed. It is the duty of the sovereign to provide for the care of the property of minors. (3 Dig. 542). Colebrook's Remarks.—*Stra.*, H. L., Vol. II, p. 305.

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CHAPTER II.

ON SUBTRACTION OF WHAT HAS BEEN GIVEN.

This is the fifth of the eighteen titles of our law.*

"When a man desires to recover a thing which was not duly given, it is called 'subtraction of what has been given;' [and this is] a title of administrative justice."—NÁRADA. See the *Shuddhi-tattwa* of RAGHU-NANDANA, and the *Vyavahára-mayúkha*, Chap. IX, § 1.

It comprises four kinds of gifts declared by NÁRADA:—"In civil affairs the law of gift is fourfold:—'What may, or may not, be given; what is, or is not, a valid gift.'"—See *Ibid.*

SECTION I.

WHAT IS A GIFT, AND WHAT IS REQUIRED FOR THE VALIDITY THEREOF.

The word 'gift' means the establishing of another's right after the previous extinction of one's own.†

Gift consists in the relinquishment of one's right, and the creation of the right another; and the creation of another man's right is completed on that of other's acceptance of the gift, but not otherwise.—*Mitákshará.* See Macn., H. L., Vol. I, p. 217.

Vyavasthá. **693.** For civil purposes all that is required to render a gift complete and valid is,—that the donor be the true owner of the subject of his gift, of sound disposing mind, and not prohibited by his law to make the gift;—and that the gift be accepted by the donee immediately or at any time before the donor's death (natural or civil);—or, that the gift be made in favor of an intended sentient person with assurance that such person is in existence, actually (*a*) or constructively (*b*), or will be in existence, and accept the gift.

Vide Precedents, pages 848—862.

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* See the Preface. † *Dat. Mím.*, Sect. IV, § 2, 4.

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(a) Here the term 'actual existence' comprehends also the fœtal existence of the donee at the time of the gift or at least at the time of the donor's death; the act of birth or conception of a person in the womb being one and the same thing in the eye of the Bengal law.(1) See *ante*, page 6, and Precedents, page 3. Explanation.

(b) By 'constructive existence' is meant the permission given to one's wife to adopt a son; because from the moment that a woman is authorized by her husband to adopt a son, the son to be adopted is held to be conceived in her. (2) Explanation.

Annotations.

(1) It applies to all persons in existence, and capable of taking from the donor at the time when the gift is to take effect so as to fall within the principle expressed in the *Dáya-bhága*, (Chap. I, § 21,) by the phrase "relinquishment in favor of the donee who is a sentient person."—Part of the Privy Council Judgment in Tagore *v.* Tagore.—*Vide* Suth. W. Rep., Vol. XVIII, p. 359; or 9 B. L. R. 377.

(1) By a rule now generally adopted in jurisprudence, this class would include children in embryo, who afterwards come into separate existence.—*Ibid.*

(2) At the moment permission to adopt is pronounced, it had the same effect, as if a child had been conceived in the womb of the widow, and her intention to adopt under the permission operated to all intents and purposes as if she were *enceinte;* and the boy subsequently adopted by her had all the rights of a posthumous child.*

(2) As to the case of adopted children, it is distinguishable, because of the peculiar law applicable to that relation. The Hindú law recognizes an adopted child, whether adopted by the father himself in his life-time, or by the person to whom he has given the power of adoption after his death from amongst those of his class, of one to stand in the place of a child actually begotten by the father. In contemplation of law such child is begotten by the father who adopts him, or for and on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognizes as in existence at the death of the testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting or otherwise taking from the testator as if he had existed at the time of the testator's death having been actually begotten by

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* Part of the law-opinion which was given by the *Pandits* in the case "Ranee Kishon-munee *v.* Rajah Oodwunt Singh," and according to which the case was decided by the late Sudder Dewany Adawlut.—*Vide* Sel. S. D. A. Rep., Vol. III, p. 228 (New Ed., p. 304).

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Acceptance is made by three means: mental, verbal, or corporeal.—Mental acceptance is the determination to appropriate: verbal acceptance is the utterance of the expression: 'this is mine,' or the like, which is a concrete certainty; corporeal acceptance is manifold, as by touching. Special injunctions have been issued as to this mode of acceptance. "Let him give the skin of an antelope by holding its tail, a cow in the same manner, an elephant by his foreleg, a horse by his mane, and a slave girl by her head." *Aswaláyana* has also said, "Let him verbally address rational beings, and touch creatures not having the faculty of reason, and female slaves."—*Mitákshará.*—See Macn., H. L., Vol. I, page 217.

Authority. The acceptance of gold, cloths, &c., being completed by the ceremony of bestowing water, and falling, therefore, under either of the means, may be designated as a three-fold acceptance; but in the case of land, as there can be no corporeal acceptance, without enjoyment of the produce, it must be accompanied by some little possession: otherwise the gift, sale, or other transfer is not complete. A title, therefore, without corporeal acceptance, consisting of the enjoyment of the produce is weaker than a title accompanied by it, or with such corporeal acceptance.—*Mitákshará.* See Macn., H. L., Vol. I, pp. 218, 219.

Authority. YÁJNAVALKYA says:—"Let the acceptance be public (*c*) especially of immovable property: and delivering what may be given and has been promised, let not a wise man resume the donation."*

Explanation. (*c*) "Public," *i. e.*, in the presence of witnesses; let him so act that he may not afterwards say, 'this was not given by me, but entrusted for use.'*

Evidence. Evidence is said to consist of written proof, possession, and witnesses. In the absence of all these, one of the divine tests is prescribed.—YÁJNAVALKYA cited in the *Víra-mitrodoya*, &c. See Macn., H. L., Vol. I, p. 195.

Authority. "Where there is not the least possession, there a title is not weighty."† With whatsoever title there is not the

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Annotations.

him. Apart from the exceptional case, which serves to prove the rule, the law is plain that the donee must be a person in existence capable of taking at the time when the gift takes effect.—Part of the Privy Council Judgment in Tagore *v.* Tagore.—*Vide* B. L. Vol. IX, p 377 or 18 W. R. 359.

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* *Coleb.* Dig., Vol. II, p. 160.

† *Kátyáyana* cited in the *Smriti-chandriká* and *Víváda-tándava.*

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least occupancy, in that title there is no sufficient weight.—*Mitákshará.*—See Macn., H. L., Vol. I, p. 217.

"Land is conveyed by six formalities, by the assent of townsmen, of kindred, of neighbours, and of heirs, and by the delivery of gold and of water."*

Remark.

Although it is ordained by the above text, how to make a gift of land, yet that regards a donation for religious uses.*

Authority.

In the case of donation, the donee's right to the thing arises from the act of the giver; namely, from his relinquishment in favor of the donee who is a sentient person.—*Dá. Bhá.*, Chap. I, § 21.

Authority.

Besides the word 'gift' occurs in a passage of law as signifying something antecedent to acceptance.—*Ibid.*, § 22.

Authority.

Though property (right) had already arisen, it is now by the act of the donee, subsequently recognizing it for his own, rendered liable to disposal at pleasure: and such is the meaning of the term 'acceptance' or 'appropriation,'—*Ibid.*, § 24.

Remark.

As the author of the *Dáya-bhága* has not expressly declared what particular time he intended to mean by using (in the above passage) the word "subsequently," the deficiency is supplied by the Dispensers of Justice by laying down that "the donee must be a person in existence, and capable of taking from the donor at the time when the gift is to take effect, so as to fall within the principle expressed in the *Dáya-bhága* (Chap. I, § 21,) by the phrase 'relinquishment in favor of the donee, who is a sentient person,'"† and the time at or within which a gift can take effect is extended by their Lordships to the death of the donor, by expressing their opinion "that a person capable of taking under a Will must be such a person as could take a gift *inter vivos*, and, therefore, must, either be, in fact or in contemplation of the law, in existence at the death of the testator."† The reason for fixing the above limit is stated in several passages of their judgments. The following is one of them,—"In considering the extent to which a person may bind his property by Will or Gift, it must be remembered that from the instant of death all further dominion on the part of the former owner ceases to exist. The property at once passes into new hands. The new owner may be the heir to whom the succession falls; or

* *Coleb.* Dig., Vol. II, p. 161.

† *Vide* Precedents, pages 889—891.

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if part is given by Will, the legatees may take such part, but in such case the residue must descend to the heirs of the former. No part can remain in abeyance or without an owner, till the happening of a future event."*

Remark. But even if it be understood to be the intention of the said author that the donee must be in existence at the time the gift was made or at least before death of the donor, yet if he (the donee) should decline to accept the gift, the gift would be void, and the property given would revert to the giver. In order, therefore, to render a gift complete and effective, it is necessary that it be *accepted* by the donee;† inasmuch as acceptance by the donee is one of the two essentials of an effective gift, his existence being a mere concomitant thereof, as he could not accept the gift unless he was in existence. Consequently,—

Vyavasthá. **694. A gift is void without acceptance, and the donor's right in the thing given reverts to him, by reason of the donee's not accepting the gift, and the same not being irrevocable before acceptance.**

Vide Precedents, pages 850, 853, 889—891.

Authority. Although the donor's right may cease by relinquishment, yet, as the gift is incomplete without acceptance by the donee, and as in such case it is said to be void, the donor's right again accrues. So NÁRADA.—*Shuddi-tattwa.*

Authority. Gift being an act whereof the effect is the generation of another's right, the term gift implies the act of inference, &c., (by the donor) in favor of the acceptance by the donee, but the production of that effect is not possible without the acceptance by the donee; hence the act of the donee completes the gift, but that alone does not constitute the gift.—*Vira-mitrodoya,* Chap. I, Sect. 50.

Authority. The act of the donee, however, is the *sine qua non* of gift, for without it, gift cannot be accomplished.—*Ibid.*

Authority. Hence, what is intended by the verb "give" (in the term gift) in the passage cited before, is abdication only—consisting of the pouring of water in favor of the intended donee, but the completion of it takes place only in case of acceptance by the donee of what is so abdicated.—*Ibid.*

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* *Vide* Precedents, pages 881—883.

† "Property", says JAGAN-NÁTHA, "vests in the purchaser through the payment of the price and acceptance of the chattel transferred: it vests in the donee solely through acceptance of the chattel, for not otherwise does he acquire it."—*Coleb.* Dig., Vol. II, p. 508.

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RAGHU-NANDANA :—"The giver's right again accrues to him by the non-acceptance of the donee, although it had (once) ceased by the act of giving."—*Shuddhi-tattwa.* Authority.

When a donor makes a gift to a person (absent), with assurance that the donation will be accepted by him, the donee's right accrues thereto, but if it be known that the gift would not be accepted by the donee, the donor's right is not extinguished.—SRÍ-KRISHNA'S Commentary on the *Dáya-bhága.* Authority.

695. In the case of a conditional gift, the right of the donor is not extinguished, nor does that of the donee accrue, unless the condition made be fulfilled. *Vyavasthá.*

Vide Precedents, pages 851—853, 881, 882.

696. If two (adverse) parties claim a property upon the allegation of gift, and if it be not known whose title is of prior date, then *he* of them is entitled (to it) who proves his possession; but if there be no possession of either of the parties, then *he* is entitled to it to whom the gift is proved to have been first made. *Vyavasthá.*

Vide Precedents, pages 854, 855.

YÁJNAVALKYA :—A title (*b*) is more powerful evidence than possession unaccompanied by hereditary succession. Where there is not the least possession, there a title is not sufficient.*—*Mitákshará.* See Macn., H. L., Vol. I, p. 219. Authority.

(*b*) A title arises from gift, sale, or other cause of right.—*Ibid.*, p. 212.

"In all other matters, the latest act shall prevail. But in the case of a pledge, a gift, or a sale, the prior contract has the greatest force."—YÁJNAVALKYA, cited in the *Mitákshará.* See Macn., H. L., Vol. I, pp. 199, 200. Authority.

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* The text, "A title is more powerful than possession unaccompanied by hereditary succession. Where there is not the least possession, there a title is not sufficient," has been propounded to point out to which the superiority belongs. In the case of the first acquirer, if a title be proved by witnesses, it is of greater weight than possession unaccompanied by hereditary succession. Again, possession accompanied by hereditary succession, vested in the fourth descendant, is more weighty than a title proved by document; but in the case of an intermediate (claimant), a title accompanied with even a small degree of possession is better than a title destitute of possession. This has been expressly declared by NÁRADA: "For the first, gift is a cause; for an intermediate (claimant), possession with a title; but long and hereditary possession alone, is also a good cause."—*Mitákshará. Vide* Macn., H. L., Vol. I, p. 219.

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Vyavasthá. **697.** The rules which respect the gift of a property, equally apply to the sale or mortgage of it.*

Vyavasthá. **698.** A gift by word of mouth is as good as a gift by a deed.

Inasmuch as a deed is nothing but a proof of the gift made; and a written gift is established on proof of the donor's declaration to that effect.

Vide Precedents, pages 848, 881.

Authority. For civil purposes 'a written contract of gift is proper; in the want of that, the donation should be attested.'—*Vide Coleb.* Dig., Vol. II, p. 160.

SECTION II.

On Fit Gifts.

[*That is, on Gifts or other transfers of property alienable.*]

These are enumerated by Vrihaspati:—"A man may give what remains after the food and clothing of his family: the giver of more may taste honey at first, but shall afterwards find it poison. Of houses and land, acquired by any of the seven† modes of acquisition, whatever is given away, should be delivered, distinguishing (land) as (it was) left by the father, or gained by the occupier himself. At his pleasure he may give what he himself acquired. A pledge must be disposed of by the law of pledges, (or subject to redemption.) But of property acquired by marriage, or inherited from ancestors, the whole ought not to be alienated. (But) if what is acquired by marriage, what has descended from an ancestor, or what has been gained by valour, be given with the assent of the wife, of the coheirs, or of the king, the gift has validity."—*Coleb.* Dig., Vol. II, p. 131.

Annotations.

697. The texts which prohibit gifts of any portion of joint property, or of the whole of a man's sole property, equally forbid the sale and mortgage of it.—Part of Colebrooke's opinion. *Vide* Stra., H. L., Vol. II, p. 433.

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* See *Vyav. Chan.*, Vol. I, Part I, pp. 40—42.

† There are seven virtuous means of acquiring property: succession, occupancy or donation, and purchase or exchange, conquest, lending at interest, husbandry or commerce and acceptance of presents from respectable men.—Manu, Chap. XIV, p. 115.

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KÁTYÁYANA declares what may and what may not be given :—"Except his whole estate and his dwelling house, what remains after the food and clothing of his family, a man may give away (*a*), whatever it be; otherwise it may not be given."—*Ibid.*, p. 133. See *Vyav. Chan.*, Vol. I, Part i, pp. 62, 63. Authority.

(*a*) Consequently the whole of his own property (except his dwelling house) that remains after the food and clothing of his family, a man may give away; such will be the sense of *the text*. "The whole" is here mentioned to show that movables and immovables are not distinguished. "His own;" by this term, deposits and the like are excepted.—*Coleb.* Dig., Vol. II, page 134. See *Vyav. Chan.*, Vol. I, Part i, pp. 62, 63. Explanation.

699. The gift or other alienation of that portion of property which may remain after the food and clothing of the family, is neither invalid nor immoral. *Vyavasthá.*

700. The alienation of any portion of one's property, thereby distressing his family, is immoral and therefore unfit, but nevertheless valid. *Vyavasthá.*

Because, in such case it is inalienable, and the maintenance of the family is an indispensable obligation. See *ante*, pages 146, 147. Reason.

701. But if the calamity of the family cannot be got over, or if the family cannot be supported, or indispensable duties cannot be performed without alienation of the whole property, even that should be done by the owner, and, if he be absent, by any person belonging to his family. *Vyavasthá.*

Vide Precedents, pages 848, 856.

VYÁSA :—Even a single individual may conclude a donation, mortgage or sale of immovable property, during a season of distress, for the sake of the family, and especially for pious purposes.—*Coleb.* Dig., Vol. II, p. 189. Authority.

But if the family cannot be supported without selling the whole immovable or other property, even the whole may be sold or otherwise disposed of.—*Dá. Bhá.*, Chap. II, § 20.

702. If, by reason of being unable to preserve or manage, or of any other justifiable cause, a woman make over the property inherited by her to the then next or superior reversioner, the transfer is good and valid.—See *ante*, page 58. *Vyavasthá.*

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Vyavasthá. **703.** Wherever a long existing usage is prevalent, there the making over of property in conformity to that usage to a certain heir, to the disinherison of the rest, assumes the character of a fit gift and is held to be a valid one. See *ante*, pages 117—122.

SECTION III.

On Unfit Gifts,

[*That is, on Gifts or other transfers of property inalienable.*]

Inalienable things enumerated by Vrihaspati, Kátyáyana, Nárada, and Daksha, are as follows:—

Vrihaspati:—The prohibition of giving away is declared to be eight-fold: a man shall not give joint property, nor his son, nor his wife, nor a pledge, nor all his wealth, nor a deposit, nor a thing borrowed for use, nor what he has promised to another.—*Coleb.* Dig., Vol. II, p. 98.

Kátyáyana:—A wife, or a son, or the whole of a man's estate shall not be given away or sold without the assent of the persons interested (*a*), he must keep them himself; but, in extreme necessity, he may give or sell them; otherwise, he must attempt to do no such thing: this has been settled in codes of law.*—*Ibid.*, p. 105.

(*a*) "Without the assent of the persons interested,"—that is, of son, wife, kinsmen, and so forth.—*Ibid.*, p. 106.

Nárada:—What is bailed for delivery, what is lent for use, a pledge, joint property, a deposit, a son, a wife, and the whole estate of a man who has issue living, the sages have declared inalienable even by a man oppressed with grievous calamities, and (of course) what has been promised to another.—*Ibid.*, p. 97.

Remark. Nárada, forbidding (such a) gift or sale even in extreme distress would contradict Kátyáyana. Therefore, in the utmost distress, a son and the rest may be given away, with the assent of the persons interested: but even in such circumstances, the gift may not be made without their assent. Such is the demonstrated rule.—*Ibid.*, p. 106.

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* In this text of Kátyáyana the gift or sale of a son or wife, without the assent of the parties interested, and without extreme necessity, is forbidden: it is not said that the gift or sale is void.—*Coleb.* Dig., Vol. II, page 105.

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A son is also given for the purpose of adoption: (this being done) as an act of duty to relieve the adoptor's distress arising from the want of male issue, no penalty is incurred.—*Coleb.* Dig., Vol. II, p. 106. Remark.

The assent (required) is (found in) the want of opposition; for it is a rule that not to forbid is to assent.*—*Ibid.*

DAKSHA:—"Joint property, deposits for use, bailments in the form called '*nyása,*' pledges, a wife, her property, deposits for delivery, bailment (in general), and the whole of a man's estate, if he have issue alive,† are things which the learned have declared inalienable, even in time of distress: the man who gives them away is a fool, and must expiate (the sin) by penance."—*Ibid.*, p. 110.

Here nine things are declared inalienable; but a son is not mentioned: including a son, ten things (and persons) may not be given. VRIHASPATI declares the prohibition of giving away to be eight-fold; though deposits may be considered as comprehended in this text under the term "*nyása,*" still female property is not included in that text; and what is promised, not included by NÁRADA (in the number of eight inalienable things,) is included in that number by VRIHASPATI. On this mutual contradiction CHANDESHWARA remarks: "It is not implied, that the enumeration of inalienable things, as delivered by other sages, is curtailed by what each himself declares." Consequently, where nine things are (declared) inalienable, it is true of eight; and if ten or eleven things be so, the same is affirmed of nine or eight.—*Coleb.* Dig., Vol. II, p. 110. Exposition.

Although it is said by DAKSHA that *Strí-dhan* is inalienable even in the time of distress, yet according to the texts of the other sages, it has been established that the husband is competent to take his wife's *Strí-dhan* and to make a sale or the like of the same, in times of distress. See *ante,* pages 227, 228. Remark.

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* Therefore the gift of a son under the age of five years may be valid; and it appears that donations may have force even without the assent (of the persons interested).—*Coleb.* Dig., Vol. II, p. 106.

The gift of a son should, however, be according to the text of VASHISHTHA:—"A son formed of seminal fluids and of blood proceeds from his father and mother, as an effect from its cause: both parents have power (for just reasons,) to give, to sell, or to desert him, but let no man give or accept an only son, since he must remain to raise up a progeny for (the obsequies of) ancestors. Nor let a woman give or accept a son, unless with the assent of her lord." See *Coleb.* Dig., Vol. II, p. 108. See also the Book on adoption.

† "If there be issue alive."—If there be a son, grandson, or great-grandson, who have equal dominion (over the property,) it is ordained by NÁRADA and many other sages that the whole of a man's estate may not be given away, and if any person, though he have issue living, do give away his whole estate, he shall be fined.—*Coleb.* Dig., Vol. II, p. 111.

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Remark. The lawyers of Bengal hold that, of things inalienable, the alienation of some of them is invalid, and that of the rest is valid. That is to say, gifts, unfit by reason of the want of proprietary right, are necessarily null and void; but that gifts unfit, because they are prohibited by general rules, may be valid, though the alienation thereof is immoral or moral according to special circumstances.* They are as follows :—

Vyavasthá. **704.** The alienation of deposits for delivery or use, bailments in the form of *nyása*, pledges, things borrowed for use, and without a legal cause, the alienation of joint property exceeding one's own share, and of *stri-dhan* without distress, are invalid, because of the want of proprietary right.

Authority, MANU :—A contract made by a person intoxicated, or insane, or grievously disordered, or wholly dependent; by an infant, or a decrepit old man, or by a person without authority, is utterly null.—*Coleb.* Dig., Vol. II, p. 193.

Authority. YÁJNAVALKYA :—A contract made by a person intoxicated or insane, or grievously disordered, or disabled, by an infant, or a man agitated by fear or the like, or by a person without authority, is utterly null.—*Ibid.*

Vyavasthá. **705.** The gratuitous gift of a wife and son without (their) opposition, and the gratuitous alienation of the whole of one's own share in the joint property, and of his sole estate if he have issue alive, are valid but immoral.

Vyavasthá. **706.** The gift of a son for adoption, and the alienation of property exceeding even one's own share in the joint estate or of his sole estate, and of the wife's property in a calamity affecting the family, for the support of the family, or performance of indispensable duties are moral as well as valid.

* Mr. Colebrooke says :—"Lawyers of Bengal hold, that an unfit gift, (*adeya*), to which class this of undivided property belongs, is immoral, and even punishable, but not void, nor voidable. (See Stra., H. L., Vol. II, page 432.) There appears, however, exceptions to this rule. It has been shown that alienation by a man, of the property in which he has no proprietary right,—such as deposits, &c., which are comprehended in the class of gifts unfit, is necessarily void: this has been maintained by the learned gentleman himself, (See Stra., H. L., Vol. II, p. 433), while on the other hand the alienation of one's sole property or his share in the joint estate, for legal causes, and of his wife's *stri-dhan* in distress, is held to be both moral and valid.

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VYÁSA:—Even a single individual may conclude a donation, mortgage, or sale of immovable property, during a season of distress, for the sake of the family, and especially for pious purposes.*—*Vide Coleb.* Dig., Vol. II, p. 188. Authority.

But, if the family cannot be supported without selling the whole immovable or other property, even the whole may be sold or otherwise disposed of, as appears from the obvious sense of the passage; and because it is directed, that a man should by all means preserve himself.—*Dá. Bhá.*, Chap. II, Para. 26. Authority.

707. In the case of wages, should an excessive amount be promised by a man in extreme distress, it should not be delivered.—*Coleb.* Dig., Vol. II, page 179. *Vyavasthá.*

KÁTYÁYANA:—But if the reward be thus offered: 'I will give all my property to him who saves me from this danger to which my life is exposed,' it shall not be so (given.)—*Ibid.*, page 178. Authority.

Danger of life is mentioned to denote extreme distress.—*Ibid.*, p. 179. Explanation.

708. In fact, should a man, during a conflagration, or during the sickness of his son, or the like, promise all his wealth to the person who shall save him, that promise is not valid; but it is reasonable that the gift should be great in proportion to the benefit conferred.—*Ibid.*, p. 179. *Vyavasthá.*

709. It must also be considered that, the resumption of an excessive gift being shown where it has been promised but not delivered, the donor has an equal right to recover it, even though it have been actually delivered.—*Ibid.*, p. 179. *Vyavasthá.*

If any litigant party, being distressed, should in any instance promise, or actually give, an excessive fee to an umpire, the excess above the sixth part of the value in dispute may be resumed; deducting a sixth part (of that value) from the amount promised (or paid), he may recover the remainder even through the intervention of the king.—*Ibid.*, page 179. Exposition.

This is intimated by JÍMÚTA-VÁHANA (in the *Dáya-bhága,*) and RAGHU-NANDANA, who, in explaining the text of KÁTYÁYANA res- Exposition.

* Cited in the *Mitákshará*, *Ratnákara*, and *Vivádá-chintámani* as of VRIHASPATI.

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pecting wealth acquired by science says—"What has been received as a gift from a pupil, as a gratuity for the performance of a sacrifice, as a fee for answering a question in casuistry, for ascertaining a doubtful point of law,"—mention the sixth part or the like, which is received for well ascertaining (the point referred by) litigant parties, who apply for an explanation of the law.—*Ibid.*, pp. 178—180.

SECTION IV.

On Irrevocable or valid Gifts.

Vyavasthá. **710. What is paid as wages (*a*), as the price of goods, as a nuptial gift or gratuity, for pleasure (*b*), as an acknowledgment to a benefactor (*c*), from affection, favour, or friendship (*d*), or as a present through regard to a worthy man (*e*), is irrevocable.**

Authority. Vrihaspati.—Things once delivered on the following eight accounts cannot be resumed, as wages (*a*), for pleasure (*b*), as the price of goods sold, as a nuptial gift to a bride (or her family), as an acknowledgment to a benefactor (*c*), as a present to a worthy man (*d*), from natural affection (*e*), or from friendship.—*Coleb.* Dig., Vol. II, p. 174.

Authority. Nárada:—They who know the law of gifts declare that things once delivered as the price of goods sold, as wages, for pleasure, from natural affection, as an acknowledgment to a benefactor, as a nuptial gift to a bride (or her family), and through regard, cannot be resumed.—*Ibid.*, p. 175.

Exposition. (*a*) "As wages:"—as a recompense paid for work performed. Revenue is paid to the king as wages, or as the price of the produce of land, because he has an interest in the soil. Kátyáyana describes wages as follows:—"Where a reward, offered for the recovery of property missing, is received for discovering it, the gift is considered (a payment of) wages.—*Ibid.*, p. 174.

Explanation. (*b*) "For pleasure:"—for the gratification of seeing dancers, and the like. What is given to a wife on the second marriage of her lord, appears to be given for pleasure, for the former wife's consent to the husband's espousal of another affords him pleasure. This and other cases may be understood according to circumstances: in all instances pleasure, (and gratification,) may be supposed (to influence the gift.)—*Ibid.*, pp. 174, and 177.

Explanation. (*c*) "An acknowledgment to a benefactor:"—in return for benefits received: so Kátyáyana:—"What is received for relieving a man from apprehension of danger, for saving him from actual peril, or for promoting a matter in which he was interested is an acknowledgment to a benefactor.—*Ibid.*, pp. 174, and 178.

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(d) "Worthy"—may be interpreted the state of worthiness; what is given to a stranger endued therewith, though no benefit should have been received from him, is a present to a worthy man.—Or a present to a worthy man may intend a gift for religious purposes, not mentioned by NÁRADA, because he had premised civil donations. ("In civil affairs, the law of gift is four-fold.") It should not be objected, that presents for religious purposes are (subject to) civil cognizance; else how could the king compel delivery? The gift alone is religious; delivery is a matter of civil (cognizance.) Then (the law concerning) what may not be given and the like, should be admitted in the case of gifts for religious purposes?—*Coleb.* Dig., Vol. II, p. 175. Exposition.

(e) "From affection:"—towards sons and the rest; "from favour:"—to servants and the rest; "from kindness:"—to a friend.—See *Ibid.* Exposition.

The mention of these irrevocable gifts is intended to show the motive of donation. In these gifts it should not be distinguished whether the property might, or might not, be given away; but pleasure, as a motive of donation, must be understood, with an exception to lust and the like.—*Coleb.* Dig., Vol. II, p. 177. Remark.

SECTION V.

ON VOID GIFTS.

711. What has been given by a man agitated with fear, anger, lust, grief, or by *(the pain* of*)* an incurable disease; by one compelled by force, by one intoxicated, insane, diseased, or not in the natural state of mind, or by an idiot, a minor, a person not his own master, or by an outcast; or in consideration of work unperformed, or to a bad man mistaken for a good one, or by one extremely old, or without authority, or in excessive joy, or as a bribe, or in jest or in sport, or by mistake, or through any fraudulent practice, or for an illegal act, is void or ungiven. *Vyavastha.*

Vide Precedents, pages 859, 862.

NÁRADA:—What has been given by men agitated with fear, anger, lust, grief; or *(the pain of)* an incurable disease (*a*), or as a bribe (*b*), or in jest (*c*), or by mistake (*d*), or through any fraudulent practice (*e*), must be considered as ungiven; so must any thing given by a minor (*f*), an idiot (*g*), Authority.

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a (slave or other) person not his own master (*h*), a diseased man, one insane (*i*), or intoxicated, or by an outcast (*j*), or in consideration of work unperformed. (*k*)—*Vide Coleb.* Dig., Vol. II, p. 181.

Authority. NÁRADA :—Though (generally) his own master, what a man does while disturbed from his natural state (of mind), the wise have declared not done, because he is not (then) his own master.—*Ibid.*, pp. 182, 183.

Authority. What is extorted by force is likewise considered as ungiven, according to the text:—"What is given by force, what is by force enjoyed, by force caused to be written, and all other things done by force, MANU has pronounced void." *Coleb.* Dig., Vol. II, p. 201.

Authority. NÁRADA :—But what shall be given ignorantly to a bad man, called a good one (*l*), or for an illegal act, must be considered as ungiven.—*Coleb.* Dig., Vol. II, p. 200.

Exposition. (*a*) Men agitated with fear, anger, lust, grief, or pain, are five (whose minds are) disturbed from their natural state; as is remarked by VÁCHASPATI MISRA, CHANDESHWARA, VÁCHASPATI BHATTÁCHÁRYA, and BHAVA-DEVA.—*Coleb.* Dig., Vol. II, p. 182.

Exposition. In cases of fear and compulsion, the man is not guided solely by his own will, but solely by the will of another. If, terrified by another, he give his whole estate to any person for relieving him from apprehensions, his mind is not in its natural state. In the case of a man agitated by anger or the like, he is not a person who discriminates what may or may not be done. But after recovering tranquillity, if he give anything in the form of a recompense, the donation is valid.—*Coleb.* Dig., Vol. II, page 183.

Explanation. (*a*) "Agitated by pain;"—afflicted with an incurable disease: so VIJNÁNESHWARA. Others explain "agitated by pain,"—afflicted with a distemper which destroys sense, as a complicated marasmus or the like.—*Ibid.*, pp. 191 and 192.

Exposition. (*b*) "Bribe;"—is thus described by KÁTYÁYANA: "Whatever is received for giving information of a thief or a robber, of a man violating the rules of his class, or of an adulterer, for producing a man of depraved manners (ready to commit thefts or other crimes), or for procuring a man to give false testimony, that is all denominated '*utcocha*' (bribe or given on illegal consideration), the giver shall not be fined; but an arbitrator or intermediate person, (receiving a bribe,) shall be held guilty."—*Ibid.*, p. 194.

Explanation. (*c*) "In jest;"—by words expressing donation, but without the intention of giving.—*Ibid.*, p. 181.

Remark. What is given as a bribe, or in jest, is a mere delivery, or a gift in words only; there is no volition vesting property in another.—*Ibid.*, p. 183.

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(d) "By mistake;"—delivering to one what was to be delivered to another, or delivering one thing instead of another which was to be given; as gold instead of silver which should have been given, or any thing delivered to a *Shúdra* instead of a *Bráhmana* to whom it should have been given, the gold and the *Shúdra* are not (the thing and the person) really intended, namely, silver and *Bráhmana*.—*Ibid.*, pp. 181, 183. Explanation.

(e) "Through any fraudulent practice;"—inadvertently, and the like: so VÁCHASPATI, BHAVA-DEVA and the author of the *Prakásha*.—*Ibid.*, p. 181. Explanation.

(f) "A minor;"—one who, from nonage, is unable to decide what should or should not be done.—*Ibid.* Explanation.

(g) "Idiot:"—naturally incapable of distinguishing right from wrong: a fool. According to its etymology from the verb *muh* (to be stupid or want of sense,) '*múrha*' signifies stupid or foolish; and thence may signify unknowing: consequently, where a man gives anything ignorantly, the gift is void.—*Ibid.*, pp. 181 to 187. Explanation.

(h) "A person not his own master:"—a son, slave, or the like: So VÁCHASPATI MISRA, CHANDESHWARA, BHAVA-DEVA, and VÁCHASPATI BHATTÁCHÁRYA: by which it is denoted, that their meaning is this: a gift made by a person technically denominated not his own master,* is void.—*Ibid.*, p. 189. Explanation.

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* "All subjects are dependent:"—land or the like given by subjects with the king's consent is a valid gift; so, if a corrody be granted by a wealthy man, the gift of it, with his assent, is valid.—*Coleb.* Dig., Vol. II, p. 189.

"A pupil is declared dependent:"—The pupil is subject to control, because the teacher shares the fruit of his actions, according to the text: "Let the teacher instruct him giving him maintenance in his house; what he earns by his own labour during that period shall belong to the teacher;" and what a pupil who is maintained by his teacher gives to another without the assent of his instructor, is not legal, for he is dependent in regard to all acts generally.—*Ibid.*, p. 189.

According to the text:—"Three persons, a wife, a son, and a slave are declared by law to have (in general) no wealth exclusively their own; the wealth which they may earn is (regularly) acquired for the man to whom they belong." Wives and the rest being dependent in all actions generally, even the gift of female property and the like, without the assent of the husband or master, is not valid. Persons not their own masters, are sons, slaves, and the like: this supposes property belonging to the son, slave, and the rest; for the gift of that which belongs to the father or master is void, because it is made without ownership, (See *Coleb.* Dig., Vol. II, pages 189, 190;) and because NÁRADA says: "a gift or sale made by any other than the true owner, must, by a settled rule, be considered, in judicial proceedings, as not made." However, women are independent with regard to the gifts of their affectionate kindred; according to the text:—"The power of women over the gifts of their affectionate kindred is ever celebrated both in respect of donation and of sale according to their pleasure, even in the case of movables;" and according to the maxim, "that the sense of the law ascertained in one instance, is applicable in others also, provided there be no impediment." The gift or other disposition of the property acquired by the son is moral if made with the father's consent, otherwise immoral; in the same manner as partition becomes lawful with the consent of the mother, though it was declared unlawful while the mother lives.

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Explanation. *(i)* "One insane:"—not in his natural state.—*Ibid.*, p. 191.

Authority. VRIHASPATI:—What is given by a person in wrath, or (excessive) joy,* or through inadvertence, or during disease, minority, or madness, or under the impulse of torror, or by one intoxicated or extremely old *(m)*, or by an outcast *(j)* or idiot, or by a man afflicted with grief or with pain. Or what is given in sport *(n)*; all this is declared ungiven or void. If any thing be given for a consideration unperformed *(k)*, or to a bad man mistaken for a good one *(l)*, or for any illegal act, the owner may take back.†—*Coleb.* Dig., Vol. II, pp. 197, 198.

Explanation. *(j)* "An outcast:"—banished for (heinous) crimes. According to HALÁYUDHA. According to HALÁYUDHA and others, it should be said, that a man banished from the family for the murder of the king, or other heinous crime perpetrated by him, has no right to give away property belonging to that family, because he is not his own master. But when a banished man gives what he himself has acquired (after his expulsion,) the gift is valid.—See *Ibid.*, pp. 198 & 182.

Explanation. *(k)* "In consideration of work unperformed:"—What a man gives, deceived by the promise of the donee, 'I will execute this business for thee, give me a reward,' is not a valid gift, if the work be unperformed.—*Ibid.*, p. 191.

Explanation. *(l)* "To a bad or unworthy man, mistaken for a good one:" as the gift of gold to a man of the servile class, or a present to a vicious priest, where the declared intention was to give it to a virtuous priest. However, what is given to an unworthy man but without distinguishing whether it be intended for a worthy person or not, is valid.—*Ibid.*, p. 198.

Explanation. *(m)* "Extremely old:"—one whose organs of sense are impaired: so MISRA.—*Ibid.*

Explanation. *(n)* "Given in sport;"—or in play. The phrase is synonymous with that which has been already explained, "given in jest."—*Ibid.*, p. 198.

Authority. GOUTAMA:—The words of a man influenced by wrath, excessive joy, terror, sickness, or avarice, or of a minor, or of a decrepit old man, of an idiot, or of one intoxicated or mad, are vain.—*Ibid.*, p. 200.

Authority. MANU:—A contract made by a person intoxicated, or insane, or grievously disordered, or wholly dependent, by an

* A gift made through inadvertency, caused by joy, is not void; but what is given without discrimination, the mind being disturbed by excessive joy, (is invalid.)—*Coleb.* Dig., Vol. II, p. 198.

† By saying "it may be taken back," the gift is declared void: donations made under the influence of grief, or the like, or by a minor, must be understood from the concurrent import of this text with that of NÁRADA.—*Ibid.*, page 197.

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infant (*o*), or a decrepit old man, or by a person without authority, is utterly null.—*Coleb.* Dig., Vol. II, p. 193. Authority.

(*o*) "Infant,"—a minor. See minority.

YÁJNAVALKYA:—A contract made by a person intoxicated, or insane, or grievously disordered or disabled, by an infant, or a man agitated by fear or the like, or by a person without authority, is utterly null.—*Ibid.* Authority.

KÁTYÁYANA:—What has been given by men under the impulse of lust or anger, or by such as are not their own masters, or by one diseased, or deprived of virility,* or inebriated, or of unsound mind (*p*), or through mistake, or in jest, may be taken back.—*Ibid.*, p. 197. Authority.

KÁTYÁYANA:—If a bribe be promised for any purpose, it shall by no means be given, although the consideration be performed: but if it had at first been actually given, it shall be restored by forcible means, and a fine of eleven times as much is ordained by the son of GARGA and by the son of MANU.—*Ibid.*, p. 195.

(*p*) "Of unsound mind."—naturally incapable of distinguishing right from wrong; or whose mind is alienated in consequence of disease or of magical arts.—*Ibid.*, p. 497. Explanation.

712. In fact, a gift attended with any defect is void; but a donation springing from a (sufficient) motive is valid.—*Ibid.*, p. 194. *Vyavasthá.*

EXCEPTIONS:—

713. A gift made for religious purposes, even by a diseased man, is valid.—*Ibid.*, p. 192.

This should be admitted, and is meant by JÍMÚTA-VÁHANA, RAGHU-NANDANA, and others.—*Ibid.* Remarks.

NÁRADA, by declaring, "in civil affairs the law of gift is four-fold," limits the rules to civil donations; there is therefore no question on the validity of gifts for religious purposes.—See *Ibid.*, pp. 94 and 192. Authority.

Hence, what is given for a declared religious purpose, even in sickness, is not invalid.—*Ibid.* Authority.

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* A gift made by one deprived of virility is void, for he has not power over the family estate; but if he give away what he himself acquired, the gift is valid. (Coleb. Dig., Vol. II, p. 197.) This must be taken to be that man who was deprived of virility before the property was vested in him, since his right could not cease if he was deprived of virility after the right was vested in him.

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Vyavasthá. **714. A gift made or recompense paid by a minor for religious purposes is valid.**

Authority. Even a minor makes presents on the eleventh day after his father's death: though given by a minor, they are *legal* gifts: his sense being unripe, the donation may be made by instructions from others, as he is taught to play at ball or the like.—*Ibid.*, p. 192.

Remark. On occasions as the above, a minor is permitted by the law itself to make gifts and pay recompense to priests or the like for the spiritual benefit of his departed ancestor.

The exceptions above shown may be regarded as fit or irrevocable gifts.

SECTION VI.

ON THE POWER OF A MAN TO MAKE A GIFT OR OTHER DISPOSITION OF PROPERTY BELONGING TO HIM.

Anciently the doctrine of our law was, that a father could not make a gift or other disposition of real property whether inherited or acquired by him, without the consent of his sons, as is clear from the following texts—

YÁJNAVALKYA:—The ownership of father and son is the same in land which was acquired by his (the father's) father, or in a corrody, or in chattels.—*Dá. Bhá.*, Chap. II, Para. 22.

YÁJNAVALKYA:—The father is master of the gems, pearls, and corals, and of all (other movable property), but neither the father nor the grandfather (*a*) is so of the whole immovable estate.—*Ibid.*, § 22.

"Though immovables and bipeds have been acquired by a man himself, a gift or sale of them *should not be made* without convening all the sons (*b*)."—VYÁSA as cited in the *Dáya-bhága, Mitákshará* and other compilations.—See *Dá. Bhá.*, Chap. II, § 29; and *Mit.*, Chap. I, Sect. i, § 27.

(*a*) Since the grandfather is (here) mentioned, the text must relate to his effects. By again saying 'all' after specifying "gems, pearls, &c.," it is shown, that the father has authority to make a gift or any similar disposition of all effects other than land, &c., but not of immovables, a corrody, and chattels, (*i. e.*, slaves.)—*Dá. Bhá.*, Chap. II, § 23.

(*b*) The concurrence of all the sons (and fatherless grandsons) in the disposition of real property is however dispensed with in the case where they happen to be all minors (at the time)

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and incapable of giving their consent to the disposition, and a calamity affecting the family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable. For—VRIHASPATI ordains: "Even a single individual may conclude a donation, mortgage, or sale of immovable property, during a season of distress, for the sake of the family, and especially for pious purposes.—See *Mitákshará*, Chap. I, Sect. i, § 28, 29.

The reason for prohibiting the disposition of real property was, that the family should not suffer for want of maintenance, since immovables and similar possessions are means of supporting the family, and the maintenance of the family being an indispensable obligation, the dissipation of the means of subsistence is censured. VYÁSA:—"They who are born, they who are (yet) unbegotten, and they who are actually in the womb, all require the means of support; and the dissipation of their hereditary maintenance is censured."*

The prohibition as to gifts is declared by YÁJNAVALKYA and the rest to be made lest by alienation the family should suffer for want of maintenance.

Accordingly it was wisely ordained that a man could not make a gift or other disposition, if by such disposition his family was likely to suffer for want of sufficient maintenance; but he could alienate what remained after providing sufficiently for the family. Thus—

YÁJNAVALKYA:—Except his wife and issue, a man may give away (his wealth) which does not affect the maintenance of his family: he cannot give the whole wealth if he have issue; or that which was promised to a stranger. (*c*) See *Coleb.* Dig., Vol. II, p. 128.

VRIHASPATI:—A man may give what remains after (providing) food and clothing for his family: the giver of more may taste honey at first, but shall afterwards find it poison.* *Ibid.*, p. 131.

KÁTYÁYANÁ:—Except his whole estate and his dwelling house what remains after food and clothing of his family, a man may give away, whatever it be, (whether fixed or movable;) otherwise it may not be given.†—*Ibid.*, p. 132.

(*c*) In expounding the text (of YÁJNÁVALKYA) JÍMÚTAVÁHANA says:—"Since here also it is said 'the whole,' this

* See *Mitákshára*, Chap. I, Sect. i, § 27—29; & *Dá. Bhá.*, Chap. II, § 23.

† The rule laid down in this text is held to be obligatory and not a moral precept. *Vide* Precedents, pages 272, 273.

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prohibition forbids the gift or other alienation of the whole. The prohibition is not against a donation or other transfer of a small part not incompatible with the support of the family. For the insertion of the word 'whole' would be unmeaning (if the gift of a small part were forbidden).—*Dá. Bhá.*, Chap. II, paras. 23, 24.

VYÁSA :—"A single parcener may not, without the consent of the rest, make sale or gift of the whole immovable estate, nor of what is common to the family." "Separated kinsmen, as those who are unseparated, are equal in respect of immovables; for one has not power over the whole, to give, mortgage or sell it."—*Dá. Bhá.*, Chap. II, § 27.

The above salutary and prudent precepts of our holy legislators have been adopted by the authors and commentators of the other schools, where they are followed in practice.—See *Vyavasthá-chandriká*, Vol. I, Part i, pp. 32—67.

But JÍMÚTA-VÁHANA, the acknowledged founder, and author of the doctrines, of the Bengal school, after adopting the precepts relative to maintenance of the family, has, in expounding the above texts of VYÁSA, laid down that the precepts inculcated in those texts are moral and not obligatory.

His expositions to the above effect are as follow :—

"It should not be alleged that, by the (above) texts of VYÁSA, one person has not power to make a sale or other transfer of such property. For, here also (in the very instance of land in common*) as in the case of other goods, there equally exists a property consisting in the power of disposal at pleasure."—*Dá. Bhá.*, Chap. II, § 27.

"But the (above) texts of VYÁSA exhibiting a prohibition are intended to show a moral offence: since the family is distressed by a sale, gift or other transfer, which argues a disposition in the person to make an ill use of his power as owner. They are not meant to invalidate the sale or other transfer."—*Ibid.*, § 28.

"So likewise the other texts (as this; 'Though immovables and bipeds have been acquired by a man himself, a gift or sale of them *should not be made* by him, unless convening all the sons') must be interpreted in the same manner. For here the words "*should*," "*be made*" must necessarily be understood."—*Ibid.*, § 29.

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* SRÍ-KRISHNA *Dáya-krama*.

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"Therefore, since it is denied, that a gift or sale should be made, the precept is infringed by making one. But the gift or transfer is not null: for a fact cannot be altered by a hundred texts." (*d*)—*Ibid.*, § 30.

"Accordingly (since there is not in such case a nullity of gift or alienation*,) NÁRADA says: "When there are many persons sprung from one man, who have duties apart, and transactions appart, and are separate in business, and character, if they be not accordant in affairs, should they give or sell their own shares, they do all that they please, for they are masters of their wealth."—*Ibid.*, § 31.

(d) A fact cannot be altered by a hundred texts.] If a *Bráhmana* be slain, the precept "Slay not a *Bráhmana*" does not annul the murder: nor does it render the killing of a *Bráhmana* impossible. What then? it declares the sin.—RAGHU-NANDANA on the *Dayá-bhága*.—See *Colebrooke's* Translation, Chap. II, Annotation 30.

SRÍ-KRISHNA and ACHYUTA, on the *Dayá-bhága* of JÍMÚTA-VÁHANA, and KÁSHÍ-RÁMA on the *Dayá-tattwa* of RAGHU-NANDANA remark on NÁRADA'S text (above cited)—'This relates to gift or alienation by a well-disposed man. But the prohibition was relative to an ill-disposed person. [Consequently, there is no contradiction.†] It is here expressly declared, that the gift or alienation is valid without consent of heirs. And thus the prohibition of gift or sale of the whole estate unless in distress, must be understood as especially regarding immovables (land, &c.) rather than chattels (gems, pearls, corals, &c.). But if this relate to a man's own acquisitions, the preceding text‡ would be impertinent. [For he had of course power over them, since they were acquired by himself.§]—*Colebrooke's* Annotation on the *Dayá-bhága*, Chap. II, § 31.

JÍMÚTA-VÁHANA is followed by all the leading authors and Commentators of this (Bengal) school.

JAGAN-NÁTHA says:—

"The father alone has absolute property; and equal dominion is affirmed to show that no unequal partition can be made in this case. Consequently, a gift made by the owner is valid, for he is not insane nor otherwise incapacitated.

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* SRÍ-KRISHNA and ACHYUTA.

† ACHYUTA.

‡ That is the text of YÁJNAVALKYA cited at page 624.

§ KÁSHÍ-RÁMA on the *Dáya-tattwa*.

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In like manner, by declaring that "the father has no power," &c., he is prevented from making an unequal division without a sufficient cause. Again; donation and sale are forbidden, to show the immorality of the act, not to annull the gift or alienation; and that is evident on the exposition of JÍMÚTA-VÁHANA and the rest."—*Coleb.* Dig., Vol. III, pp. 36, 37.

"If any father, infringing the law, absolutely give away the whole or part of the immovable property acquired by himself, or inherited from his own father, that gift is valid, provided he be not impelled by lust, (or) wrath, (nor act with) guile, or the like. However, he commits the moral offence of violating the law. More on this subject will be subsequently delivered with the opinion of JÍMÚTA-VÁHANA and the rest."—*Ibid.*, p. 37.

"If the whole immovable property be given away, the consequent distress of the family, through want of subsistence, is the sole cause of moral guilt; the gift or alienation is not annulled; for it is made by an owner, who is neither insane nor otherwise incapacitated. The two texts (of VYÁSA) cited by JÍMÚTA-VÁHANA are also intended to show the immorality of the act, not to annull the sale or other alienation."—*Ibid.*, Vol. III, p. 39.

"The gift of wealth inherited from a grandfather not being included under the title of *Void gifts*, the text of YÁJNAVALKYA ('the father is master of gems,' &c.) is considered as a moral prohibition of such gifts."—*Ibid.*, Vol. II, p. 118.

"No one has expressly said, that the immovable patrimony, given without the assent of sons and the rest, is not a valid gift."—*Ibid.*, p. 159.

"The gift of a man's whole estate is valid, for it is made by the owner: but the donor commits a moral offence, because he observes not the prohibition."—The *Smriti-sára.*—*Ibid.*, p. 118.

Upon the ground of the above and other passages many of the *Pandits* who flourished about the latter part of the eighteenth century declared that gift or other disposition by a man even of the whole of his ancestral property, though sinful and immoral, was valid. And their opinion was acted upon by the then dispensers of justice who at the time had no means of acting independently of the *Pandits.* Thus the doctrine of '*factum valet quod fieri non debuit*' which had been already introduced by JÍMÚTA-VÁHANA and the

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rest, came into operation, in our country, in regard to alienation by males, of any description of property,—ancestral or self-acquired, real or personal,—and it has been prevailing since. So now the settled law on the subject in question is that,—

715. A man, without the consent of his sons and the rest, can give, sell or otherwise dispose of any portion or even the whole of his property inherited or acquired, real or personal, and such disposition, though sinful and immoral, will hold good. *Vyavasthá.*

Vide Precedents, pages 863—903.

A Hindú's Will being considered 'a gift in contemplation of death to take effect upon the death of the testator or at a future time, and governed by the general rules of the law of gift, it was determined in the latter end of the last century* to be the doctrine of the Hindú law as current in the Bengal school, that— Hindús' Wills.

716. A Hindú governed by the law of the Bengal school may leave by Will his sole property, or his share in the joint and undivided estate, real or personal, ancestral or acquired, in favor of any existing person who must accept the bequest immediately, or at any time before the testator's death, or immediately after his death,—or in favor of an intended sentient person with assurance that he is or would be in existence, actually or con- *Vyavasthá.*

Annotations.

715. The law of gifts during life is of the simplest character. As to ancestral estate, it is said to be improper that it should be alienated by the holder, without the concurrence of those who are interested in the succession, but by the law, as prevailing in Bengal at least, the impropriety of the alienation does not affect the legal character of the act *(factum valet)*, and it has long been recognized as law in Bengal that the legal power of transfer is the same as to all property, whether ancestral or acquired.—Part of the Privy Council judgment in Tagore *v.* Tagore.—See B. L. R., Vol. IX, page 377.

* See *ante*, pages 606—611.

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structively,* and would accept the bequest: and the legacy or gift so made will hold good, however reprehensible it may be, as a breach of an injunction or precept.

Vide Precedents, pages 863—909.

Accordingly the Courts of justice affirmed and gave effect to the Wills made by the Hindús of Bengal.

Remarks. The first Will litigated in the late Supreme Court of Calcutta was that of Muddun Mohun Dutt, a respectable inhabitant of Calcutta. He had four sons and a considerable property, ancestral and self-acquired. Having provided for his eldest son by appointment and advanced to the three younger sons in his life-time the means of their establishment, he thought it proper to leave the whole of what he possessed to the two younger ones, to the disherison of the two elder, of whom the second disputed the Will; but it was established on reference to the *Pandits* of the Court. Their

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Annotations.

716. As to gifts by way of Will, whatever doubts may have once been entertained by learned persons as to the existence of the testamentary power, those doubts have been repelled by a course of practice in itself enough, if necessary, to establish an approved usage, and by a series of judicial decisions both here and in India, proceeding upon the assumption that gifts by Will are legally binding, and recognizing the validity of that form of gift as part and parcel of the general law. The introduction of gifts by Will into general use has followed in India, as it has done in other countries, the conveyance of property *inter vivos*:—Part of the Privy Council judgment Tagore *versus* Tagore. *Vide* Suth., W. Rep., Vol. XVIII, page 359; Or 9 B. L. R., 377.

The analogous law in this case is to be found in that applicable to gifts, and even if Wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally to be regarded as to the property which they can transfer and the persons to whom it can be transferred.—*Ibid.*

Their Lordships, for the reasons already stated, are of opinion that a person capable of taking under a Will must be such a person as could take a gift *inter vivos*, and must either in fact, or in contemplation of law,* be in existence at the death of the testator.—*Ibid.*

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* *Vide* Precedents, pages 890, 891.

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answers were short; simply affirming the validity of the instrument according to the *Shástra*. Sir Robert Chambers and Sir William Jones, being both on the Bench at the time, concurred in this determination. This case was decided about the year 1789.—*Vide* Stra., H. L., Vol. I, (F. E.), pp. 261, 262.

The next two Wills (one in Bengali and the other in Persian) which received judicial recognition and affirmation were those of Rajah Krishna-chandra Roy, zemindar of Nuddea. These Wills were made in the year 1781 and produced before the Civil Court of the Zillah in August 1789. By these instruments the Rajah, settled the whole zemindari with its honors on his eldest son, Shib-chandra Roy, with pecuniary provision for the three younger sons, and for the adopted children of the two other (deceased) sons, payable out of the proprietary income of the zemindari.

In August 1789, Ishan-chandra Roy, one of the younger sons of the said Rajah, brought a suit in the Zillah Court of Nuddea, against his nephew Ishwar-chandra Roy, for a fourth share of the zemindari, on the ground that by the Hindú law of inheritance, each of the sons was entitled to a portion; that the disposition made by the said Rajah was not a gift, and at all events he had not by Hindú law power to make one. Against this the defendant pleaded his title to the whole estate under the deed in his father's favor; and the question in the case (independently of the point as to whether the zemindari was, or was not, subject to division) was whether the zemindar was legally empowered, or not, to make the gift pleaded by the defendant. Numerous *Pandits* of different parts of the country were consulted, and according to the majority of their opinions, apart from the question whether the zemindari had been previously exempt from division or not, the gift made by the zemindar settling the zemindari on his eldest son with a provision for the younger ones, was declared legal.

The Judge of Nuddea maintaining the validity of the gift, and of the title derived from it, decreed the whole zemindari to be the right of the defendant, subject to a pecuniary provision for the plaintiff.

The late Sudder Court in appeal finding that the zemindari of Nuddea has never been divided, and that the plaintiff's claim was contrary both to law and usage of the zemindari, dismissed his claim; and the Zillah Judge (directed by the said Court) awarded to him a further sum of Sicca Rs. 250 per month to be paid from the zemindari, in addition to the sum of Rs. 250 before received by him, upon the ground that the former was inadequate to his situation and circum-

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stances.—See the decision which is passed in the above case, and which is to be found at pages 337—341 of this part of the present work.

Although it was manifest on the face of the decision in question, that the plaintiff's claim was dismissed not upon the Wills set up therein being declared legal and valid, but upon the usage or impartibility of the zemindari itself, yet the decision in question was considered to have finally settled the law on the point, and set the questions regarding simple gifts and those by way of Will at rest. Accordingly the Courts of justice unscrupulously went on upholding and giving effect to Hindús' Wills—as well as deeds of gift or other descriptions of transfer, and no one ventured to question the legality of the same.

In the meantime the Courts of justice received further support from the pen of the highest European authority on matters of Hindú law, I mean Mr. Henry Colebrooke, who, in reply to the questions sent to him by Sir Thomas Strange, expressed his opinions on the subject of Hindús' gifts, both simple and testamentary, and their power to make such dispositions, ultimately stating the then prevalent doctrine of the Hindú law of Bengal Proper. His opinions are as follow :—

Colebrooke's opinion.

"After much consideration of the question, when agitated some years ago, it was here settled, that a Will (though this disposal of property be unknown to the law, as was remarked by Sir William Jones) must nevertheless be held valid in the case of a Hindú; being in fact a gift made in contemplation of death, which the Hindú law, if it do not directly sanction, contains at least nothing to prohibit. Considering it then as a gift to take effect at a future time, determinable by a certain event, (decease of the giver,) I apprehend it must be governed and controlled by the general rules regarding gift."—*Vide* Strange's Hindú law, Vol. II, page 431.

Colebrooke's opinion.

Then in a letter written a few days after the above, he gave an ampler exposition of the law, with his own opinion on the subject, which runs thus :—

"When writing a few days ago, I stated that I thought a Hindú's Will and testament must be governed and controlled by the general rules respecting gifts. It will hold good, I think, for the same things for which a gift made in his life-time would do so, and not otherwise. I should have added, however, that his legacies to his family must be controlled by the rules regarding partition made in his life-

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time by him, as father of the family. The principle I would lay down is,—'that a man cannot confer on a stranger, or his own kin, by Will, (which I consider to be a donation in contemplation of decease,) what he could not bestow by deed of gift, or partition of patrimony.' The utmost that can be said, is that he may do that by testament which he could have done by partition or donation between living persons. This is allowing all the force that can be given to a Will, by taking it as a gift, in regard to what the testator has power to give; and, as a partition of inheritance, in regard to what he can distribute, but not give away."—*Ibid.*, p. 435.

Colebrooke's opinion.

"Upon the principle which I have stated a Hindú in Bengal may leave by Will all his own acquisitions: but would be restricted, if he have sons from distributing ancestral property according to his mere pleasure. In provinces, in which the authority of *Mitákshará* prevails, a Hindú is restrained from giving away immovables and from making any other partition of his possessions among his male descendants, than such as the law has sanctioned. Consequently, he would be withheld from distributing immovables in a mode unauthorized by the law, but may bestow movables of which the law permits him to make gifts on motives of natural affection: not, however, to the extent of his whole property."—*Ibid.*, pp. 435, 436.

Colebrooke's opinion.

"In short, if there be no sons, or male descendant, and the property be not shared by a co-heir, the whole of his possessions, being his separate and distinct property, may be disposed of by will, as he pleases. If he have a co-parcener, he cannot give away his entire share of the joint property; nor the whole of his possessions, if he have sons."—*Ibid.*, p 436.

Remark.

These are the true expositions of the law and ought to have been acted upon; but it was too late. Numbers of Wills and deeds of gift relative to the transfer of entire estates, movable and immovable, acquired and ancestral, had already been admitted and affirmed; and thereby the doctrine of '*factum valet*' was too deeply rooted to be shaken, so much so, that Mr. Colebrooke, seeing it too difficult to re-establish the doctrine laid down by him, at length wrote a letter to Sir Thomas Strange modifying his expositions in accordance with the prevalent practice and the decisions already passed. The following is an extract of the letter to that effect:—

Colebrooke's opinion.

"Upon reference to adjudged cases, and upon consideration of the inferences to be drawn from them, and principles

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held to have been settled by these judgments, I find occasion to correct that part of my letter on the subject of Wills by Hindús, in which I said that a Hindú in Bengal may leave by Will all his own acquisitions, but is restricted from distributing ancestral property among his children, according to his own pleasure. It is true that, if he make a formal partition of heritage, he is subject to restrictions; and no express decision has weakened the strict rule of law on this point. But a deed of gift, by which the ancestral property was unequally distributed, [or was given to one son with a very inferior provision for the rest,] has been held valid by a solemn decision of the former Court of Sudder Dewany Adawlut; and I understand that, in numerous instances, Wills of Hindús disposing of the ancestral as well as acquired property, according to the testators' pleasure, have been allowed by the Supreme Court."

"It appears to me an inconsistency, that a man may do that by gift or Will which he may not do by a formal partition; and the Hindú legislators might have saved themselves the trouble of providing rules to regulate a father's distribution, if the whole may be evaded by the easy expedient of calling the distribution "a gift," instead of a partition. But since the point is here a settled one, what I said on the subject may require modification.—'*A Hindú in Bengal may leave by Will, or bestow by deed of gift, his possessions, whether inherited or acquired; and the gift or legacy, whether to a son or stranger, will hold, however reprehensible it may be, as a breach of an injunction and precept.*'—*July* 22*nd* 1812."—See Strange's Hindú law, Vol. II, pp. 437, 438.

Colebrooke's final opinion.

Remarks. In 1829, Mr. William Macnaghten (afterwards Sir William Macnaghten,) published his work on Hindú law, and therein he agitated the question regarding a Hindú's power to make gifts, &c., or testamentary disposition, and strongly protested against it, asserting that no such power is granted him by his law, and that deeds of gifts, testamentary dispositions, or other tranfers by Hindús are illegal and therefore invalid. He refuted the opinions delivered by JAGAN-NÁTHA and KRIPÁ-RÁMA, the two celebrated Hindú Jurists, in the Nuddea case, and made several other remarks against the legality of the dispositions in question. His remarks against the law opinions delivered in the above case are given by way of foot notes under the decision passed therein.* His other remarks to the above effect will be found in their proper places.

* See pages 337—341 of this part of the present work.

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In the third case which was of *Rám-kumár Nyáya-báchaspati* against *Krishna-kinkar Tarka-bhúshan,* (decided on the 24th of November 1812,) and in which it was decided that the gift by a father of the whole of the ancestral estate to one son to the prejudice of the rest or even to a stranger is a valid act (although an immoral one,) according to the doctrine received in Bengal.—See Select S. D. A. Reports, Vol. II, p. 42, (New Ed., p. 52).

Sir William Macnaghten impeached the above decision or rather the law opinion according to which the decision was passed, by saying,—"To refute the opinion declared by the *Pandits* on that occasion, it is merely necessary to state the authorities quoted by them, which would have been more applicable to the maintenance of the opposite doctrine. The following were the authorities cited in support of the above opinion. 1*st.* The text of VISHNU, cited in the *Dáya-bhága:* 'When a father separates his sons from himself, his Will regulates the division of his own acquired wealth.' 2*nd.* A quotation also from the *Dáya-bhága*: 'The father has ownership in gems, pearls, and other movables, though inherited from the grandfather, and not recovered by him, just as in his own acquisitions; and has power to distribute them unequally; as YÁJNAVALKYA intimates: 'The father is master of the gems, pearls, and corals, and of all (other movable property,) but neither the father nor the grandfather is so of the whole immovable estate.' Since the grandfather is here mentioned, the text must relate to his effects. By again saying 'all' after specifying 'gems, pearls, &c.,' it is shown, that the father has authority to make a gift or any similar disposition of all effects other than land, &c., but not of immovables, a corody, and chattles, (*i. e.*, slaves); since here also it is said, 'the whole:' this prohibition forbids the gift or other alienation of the whole, because (immovables and similar possessions are) means of supporting the family. For, the maintenance of the family is an indispensable obligation; as MANU positively declares: 'The support of persons who should be maintained, is the approved means of attaining heaven: but hell is the man's portion if they suffer. Therefore (let a master of a family) carefully maintain them.' The prohibition is not against a donation or other transfer of a small part not incompatible with the support of the family: for the insertion of the word 'whole,' would be unmeaning (if the gift of even a small part were forbidden). The text of YÁJNAVALKYA, cited in *Práyashchitta-viveka:* 'From the non-performance of acts which are enjoined, from the commission of acts which are declared to be criminal, and from not exercising a control over the passions,

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man incurs punishment in the next world.' An examination of the authorities above quoted, as given by the law officers in the case in question, will make it evident that they are totally insufficient for the support of the doctrine to which they were intended to apply."—Macn., H. L., Vol. I, pages 8—19.

His other remarks to the above effect are as follow:—

"In ancestral real property, the right is always limited; and the sons, grandsons, and great-grandsons of the occupant, supposing them to be free from those defects, mental or corporeal, which are held to defeat the right of inheritance, are declared to possess an interest in such property equal to that of the occupant himself; so much so that he is not at liberty to alienate it, except under special and urgent circumstances, or to assign a larger share of it to one of his descendants than to another. With respect to personal property of every description, whether ancestral or acquired, and with respect to real property acquired or recovered by the occupant, he is at liberty to make any alienation or distribution which he may think fit, subject only to spiritual responsibility. The property of the father being thus restricted in respect of ancestral real property, and Wills and testaments being wholly unknown to the Hindú law, it follows, for the sake of consistency, that they must be wholly inoperative, and that their provisions must be set aside, where they are at variance with the law; otherwise a person would be competent to make a disposition to take effect after his death, to which he could not have given effect during his life-time. A Will is nothing more or less than 'the legal declaration of a man's intentions, which he wills to be performed after his death:' but willing to do that which the law has prohibited, cannot be held to be a legal declaration of a man's intentions. There may be a gift in contemplation of death, but a Will, in the sense in which it is understood in the English law, is wholly unknown to the Hindú system; and such gift can only be held valid under the same circumstances as those under which an ordinary gift would be considered valid. What may not be done *inter vivos*, may not be done by Will. Of this description is the unequal distribution of ancestral real property."—Macn., H. L., Vol. I, pp. 2—4.

"In the case of *Bhowání-charan Banerjea* v. the heirs of *Rám-kánt Banerjea* which was decided by the Sudder Dewany Adawlut on the 27th of December 1816, the question as to the father's power was thoroughly investigated. There being a difference of opinion between the *Pandits* attached to the Sudder Dewany Adawlut, the following question was

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proposed to the *Pandits* of the Supreme Court, *Tárá-prasád* and *Mrityun-joy*, to *Nara-hari*, *Pandit* of the Calcutta Provincial Court, and *Rám-joy*, a *Pandit* attached to the College of Fort William: "A person whose elder son is alive, makes a gift to his younger, of all his property, movable and immovable, ancestral and acquired. Is such a gift valid, according to the law authorities current in Bengal, or not? and if it be invalid, is it to be set aside or not?"

"The following answer, under the signatures of the four *Pandits* above mentioned, was received to this reference:—'If a father, whose elder son is alive, make a gift to his younger son of all his acquired property, movable and immovable, and of all the ancestral movable property, the gift is valid, but the donor acts sinfully. If during the life-time of an elder son, he make a gift to his younger of all the ancestral immovable property, such gift is not valid. Hence, if it have been made, it must be set aside. The learned have agreed that it must be set aside, because such a gift is *á fortiori* invalid; inasmuch as he (the father) cannot even make an unequal distribution among his sons of ancestral immovable property, as he is not master of all; as he is required by law, even against his own will, to make a distribution among his sons of ancestral property not acquired by himself, (*i. e.*, not recovered); as he is incompetent to distribute such property among his sons until the mother's courses have ceased, lest a son subsequently born should be deprived of his share; and as, while he has children living, he has no authority over the ancestral property.'"

"I have given the above opinion, together with the authorities cited in its support,* at full length, from its being apparently the most satisfactory doctrine hitherto recorded on the subject. By declaring void any illegal alienation of the ancestral real property, it preserves the law from the imputation of being a dead letter, and protects the son from being deprived, by the caprice of the father, of that in which the law has repeatedly and expressedly declared them both to have equal ownership. Upon the whole, I conclude that text of *Dáya-bhaga* which is the ground-work of all the doubts and perplexity that have been raised on this question, can merely be held to confer a legal power of alienating property, where such power is not expressly taken away by some other text. Thus in Bengal a man may make an unequal distribution among his sons of his

* These are omitted here as they are to be found in the decision itself.—See *ante*, pages 725—735.

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personally acquired property, or of the ancestral movable property; because, though it has been enjoined to a father not to distinguish one son at a partition made in his lifetime, nor on any account to exclude one from participation without sufficient cause, yet, as it has been declared in another place that the father is master of all movable property and of his own acquisitions, the maxim that a fact cannot be altered by an hundred texts here applies to legalize a disregard of the injunction, there being texts declaring unlimited discretion, of equal authority with those which condemn the practice. In other parts of India, where the maxim in question does not obtain, the injunction applies in its full force, and any prohibited alienation would be considered illegal."—Macn., H. L., Vol. I, pp. 10—14.

The agitation and objections thus made by Sir William Macnaghten having raised a doubt in the mind of the then learned Judges of the late Supreme Court, as to the legality of the doctrine maintained, and the principle inculcated, by them in their decisions upholding Hindús' Wills, a letter was addressed by them to the then Judges of the late Sudder Dewany Adawlut, requesting an answer to the following questions:—

1*st*.—Whether according to the doctrines of the Sudder Dewany Adawlut, a Hindú who has sons, can sell, or give, or pledge, without their consent, immovable ancestral property situated in the province of Bengal?

2*ndly*.—Whether without the consent of the sons, he can by Will prevent, alter, or affect in any way their succession to such property?

To these questions the following letter was received in reply:—

"We have the honor to acknowledge the receipt of your letter, requesting our opinion as to the doctrine entertained by the Court of Sudder Dewany Adawlut on certain points of Hindú law."

"On mature consideration of the points referred to us, we are unanimously of opinion, that the only doctrine that can be held by the Sudder Dewany Adawlut, consistently with the decisions of the Court and with the customs and usages of the people, is, that a Hindú, who has sons, can sell, give, or pledge, without their consent, immovable ancestral property, situate in the province of Bengal; and that without the consent of the sons, he can, by Will, prevent, alter or affect their succession to such property."

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"We beg leave to add, with reference to the case adverted to in your letter, decided in 1816, that we do not consider the opinions of the Judges, as recorded in that case, to affect or contravene the principle on which the previous decisions of the Court were founded."*—2nd September, 1831.

(Sd.) A. Ross,
C. T. Sealy,
R. H. Rattray,
H. Shakspear,
M. H. Turnbull.

See Clarke's Notes of Decided Cases.—pp. 104, 105.

On receipt of the above letter, Grey, C. J., recorded his judgment as follows:—

"We have before us a most important document, I mean the letter signed by the five judges of the Sudder Dewany, in reply to a letter addressed to them by the judges of this Court, requesting a statement from them of what the decisions of the Sudder Dewany had been on this point of Hindú law. It is impossible to say, after the communications we have received from the judges of the Sudder Dewany, that the doctrine on this point laid down in Mr. William Macnaghten's book, would be acted upon in that Court as the Hindú law of Bengal; but it is undoubtedly the general law of the Hindús, but in Bengal a different usage prevails. This in no degree alters the very high opinion which I entertain of Mr. Macnaghten's work; it is a work which evinces the greatest research and soundest judgment, and must always be esteemed as a very valuable authority.

Franks, J.—Concurred in the judgment of the Chief Justice.

Ryan, J.—"I concur in the judgment of the Court. Surely the law on this subject ought now to be considered as finally set at rest. The decisions of this Court were

* On this occasion Mr. Henry Shakspear, the fourth Judge of the said Court, drew up a minute as explanatory of his view of the law: in the latter part whereof he quoted Colebrooke's opinion as contained in the last paragraph of his letter of 22nd July 1812, *ante* p. 634, and thus remarked, alluding to Sir William Macnaghten: "Now I imagine Mr. Henry Colebrooke to be the highest European authority on matters of Hindú law; but supposing others to be equally well read, no one can be placed in competition with him as to the two qualifications,—a knowledge of the law, and of the practice and observances of this Court, in which he was so many years the Chief Judge."—Clarke's Notes of Decided Cases, p. 111.

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uniform from the time of its establishment, until the publication of Mr. Wm. Macnaghten's book; and it can be a matter of no wonder that we were for a short time misled by his authority. I myself was the first to fall into the error, and nonsuited a party in a suit in ejectment, entirely on his statement of the Hindú law, but on further consideration, I think I was wrong. Shortly after his book had raised these doubts, the present case was brought forward, and the Court have had the advantage of an able and elaborate argument by the bar on both sides of the question; the Judges have most deliberately considered the matter; they have examined all the former decisions of this Court, and they have the unanimous opinion of the five judges of the highest native Court in India. It is under these circumstances that the Court now unanimously determine, that the doubts, which they did entertain in consequence of Mr. Wm. Macnaghten's work, no longer exist, and they return to those doctrines which have universally prevailed in this Court since its establishment. I therefore hope the question is now finally settled."

GREY.
FRANKS. } *Judges.*
RYAN.

Clarke's Notes of Decided Cases, pp. 115—118.

In addition to the above, it is to be remarked that by selecting, approving of, and publishing as precedents in the second volume of his work on Hindú law certain admitted legal opinions which supported the doctrine maintained by the above tribunals, Sir William appears to have contradicted his own opinion against the legality and validity of a Hindú's Will. As regards the learned compiler's assertion that—"Wills and testaments are wholly unknown to the Hindú law,"—it may be remarked that a Will, according to his own definition, is nothing more or less than the legal declaration of a man's intentions, which he wills to be performed after his death, while a Hindú's Will is defined by Mr. H. Colebrooke to be in fact a *gift in contemplation of death*; and in both the senses, it is comprehended in the passages which are cited as authorities for the *Vyavasthá* No. 717, and which as well as the following text of NÁRADA give unlimited power to a Hindú proprietor to dispose of his property as he pleases. "Should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth." Besides, SRÍ-KRISHNA TARKÁLANKÁRA, who is one of the paramount authorities with the Bengal School* appears to have, by the subjoined

* See the Preface.

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passage, provided in a manner for the disposition to take place after one's death. "But when the father, for the sake of obviating disputes among his sons, determines their respective allotments, continuing, however, the exercise of power over them, that is not partition: for his property still subsists, since there has been no relinquishment of it on his part. Therefore, the use of the term partition, in such an instance, is lax and indeterminable." (See *Dá. bhá.*, Sans., p. 17.)

JAGAN-NÁTHA said,—"In the case of a gift in this or other form, 'this field belonging to me shall belong to them after my death' the act of volition which constitutes gift is passed at that very time. The property of the giver is not divested, nor is it vested in the donee until after the giver's demise," and then added,—"authors admit the gift of a future thing."* See Precedents page 886.

Thus testamentary dispositions being included in, and intimated by, the authorities above cited, Will is not *wholly* unknown to the *Hindú* law as affirmed by the learned compiler.

The doubts entertained by the learned Judges of the (late) Supreme Court in consequence of Sir William Macnaghten's writing (as above) being thus dispelled, the Courts in Bengal unscrupulously went on upholding and giving effect to Hindús' Wills without even testing their legality by reference to the law of gifts by which they were to be governed, setting aside only those which were against the rule of perpetuity, until the year 1869, when a suit being brought in the High Court of Judicature by Gyanender Mohun Tagore in regard to the Will of his father, the late Hon'ble Prosunno Kumar Tagore, to obtain certain declarations and relief, the Will was upheld *in toto*, and the suit dismissed, by the Court in its original jurisdiction; but on appeal, the learned Chief Justice—that eminent lawyer and sagacious Judge, Sir Barnes Peacock—seeing that the Will in question was drawn not in conformity with the rules of gift as prescribed by Hindú law, according to which the same ought to have been made, passed a decision setting aside those parts thereof which were inconsistent with the provisions of the above law.

This learned and elaborate decision, though in part varied, was affirmed by the Privy Council mainly upon the same principle as was laid down by the High Court of Judicature.

* *Vide Coleb.* Dig., Vol. II (Cal. Ed.) p. 284.

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Both the Tribunals recognized and finally confirmed the testamentary power of dispositions by Hindús consistently with the general rules of Hindú law relating to gift or other transfer of property, as will be known on perusal of the passages of their judgments contained at pages 874—891 of the Precedents. Thus it must be said that the question regarding the power of a Hindú of Bengal to dispose of his property by gift, simple or testamentary, or in any other way, is conclusively set at rest.

Between the passing of the above two decisions respectively dated the 1st of September 1869 and the 5th of July 1872, was promulgated the Hindú Wills Act (XXI of 1870), notwithstanding which cases regarding Hindús' Wills continued to be decided according to the principles laid down in the above-mentioned decisions until August 1881, when the case of 'Alanga-monjori Dabee *v.* Sona-moni Dabee' came on to be tried before Mr. Justice Wilson, one of the Puisne Judges of the High Court, and His Lordship, for reasons stated in his decision,* held that the rule of construction laid down in the Tagore case does not apply to Wills of Hindús made since the passing of Act XXI of 1870, that is, the Hindú Wills Act, and accordingly upheld gift to unborn persons under the provisions of that Act, and that Act alone.

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* *Vide* Precedents pages 892—898, in which the above decision is given *in extenso*.

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CHAPTER III.

ON PRE-EMPTION, RELIGIOUS ENDOWMENTS, INTEREST, &c.

SECTION I.

ON PRE-EMPTION.

The right of pre-emption (or the right of purchase before others), is thus propounded by MAHÁ-DEVA or SHIVA.*

"The proprietor of an immovable property, having a neighbour able to purchase it, is not at liberty to sell such property to another. Among neighbours, he who is an *agnate*, or of the same caste, is preferred. In default of them two, a friend: (here) the will of the seller prevails. Even if the price of the immovable property be settled by another, yet if a neighbour, desiring to purchase, tender that price, he becomes the purchaser, and not the other. If the neighbour be unable to pay the price, or give consent to the sale, then the householder, (*i.e.*, the owner of the property) is at liberty to sell it to another. O Goddess! if immovable property be sold in the absence of the neighbour, and he (the neighbour) pay the price immediately upon hearing (of it), he is entitled to have the same. If (however) the purchaser has made houses and gardens thereupon, or destroyed them, (then) the neighbour is not entitled to have (such) immovable property even by paying the price."†—

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* One of the Gods of the Hindú Triad, who is the destroyer of the Universe.

† The original of the above is as follows :—

स्थावरं धनमन्यस्मै स्थिते सान्निध्यवर्त्तिनि ।
योग्ये क्रेतरि विक्रेतुं न शक्तः स्थावराधिपः ॥ १०७ ॥
सान्निध्य-वर्त्तिनां ज्ञातिः सवर्णो वा विधिष्यते ।
तयोरभावे सुहृदो विक्रेतिच्छा गरीयसी ॥ १०८ ॥
निर्णीत-मूल्ये ऽन्यस्मै न स्थावरस्य क्रयोद्यमे ।
तन्मूल्यं चेत् समीपस्थो राति क्रेता न चापरः ॥ १०९ ॥
मूल्यं दातुमशक्तश्चेत् सम्मतो विक्रयेऽपि वा ।
सन्निधिस्थस्तदान्यस्मै ददाति शक्तोऽतिविक्रये ॥ ११० ॥
क्रीतं चेत् स्थावरं देवि, परोक्षे प्रतिवासिनः ।
श्रवणादेव तन्मूल्यं दत्त्वासौ प्राप्तुमर्हति ॥ १११ ॥
क्रेता तत्र गृहारामान् विनिर्म्माति भनक्ति वा ।
मूल्यं दत्त्वापि नाप्नोति स्थावरं सन्निधिस्थितः ॥ ११२ ॥

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Mahá-nirvána Tantra, Chap. XII, verses 107—112 of the Edition (in Sanskrit) printed in, and published from, the *Ádi Bráhma Samája.*

Remarks.—

Upon the authority of the above, as well as according to the local usage which appears to have been founded on ideas taken from the Mahomedan law, rather than from the Hindú law, the right of pre-emption has become prevalent among the Hindús of the Upper-provinces.*

But as respects Bengal Proper, only three cases of this country appear to have been decided by the late Sudder Dewany Adawlut. In the first of these, the question for decision was, whether among the holders of separate shares of a hereditary zemindary, each, according to the Hindú law, may sell his share to *whomsoever* he pleases, or whether the other co-sharers had a right of pre-emption. One of the *Pandits* of the above Court declared, that the sale was not valid; the other, that it was: a third *Pandit* was then called in, who supported the latter opinion; but none of them cited any authority in support of what he said. The Court then having no means of ascertaining whose opinion was correct, took the safest course of following the opinion of the majority.

The second case came on to be tried in the year 1820, that is 28 years after the first.† The *Pandits* being again consulted, declared—'that the gift or sale of a portion of hereditary property, held in common with brothers or other sharers, is without their consent irrevocably valid, and has been maintained by all the Bengal writers, ancient and modern, who contend for the partial *rights,*‡ from which is to be inferred the validity of lands acquired by purchase, without the consent of neighbours or joint shareholders; since according to them, nothing more than the infraction of a precept is incurred by a person through the forbidden sale or gift of his joint property."

"The prohibition," they added, "in the *Mahá-nirvána Tantra,* of sale of immovable property without the consent of kinsmen, friends and persons of the same caste, being at variance with the above doctrine, is not approved by any of the Bengal writers; they indeed hold that a thing forbidden, if done, cannot be cancelled."

And for authority of the above, they cited the well-known text of NÁRADA—(viz). "When there are many persons

* See *Vyavasthá-chandriká,* Vol. II, Part ii, pp. 547—551.

† *Vide* Precedents, pages 904—907. ‡ See *ante,* pages 532, 533.

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sprung from one man, who have duties apart, and transactions apart, and are separate in business and character, if they be not accordant in affairs, should they give or sell their own shares, they do all that as they please, for, surely, they are masters of their own wealth."

As the question put to the *Pandits* has not been inserted in the report of the case, it cannot be said whether or not the above reply of theirs is a proper answer to the question. But, at all events, it is quite clear that it is irrelevant to the point at issue, which is, 'whether any of the co-sharers of a joint property is competent to sell his share therein to a stranger notwithstanding another co-sharer tendered the same price as was offered by the stranger; and whether such co-sharer has not a right to enforce his claim of pre-emption?' The answer given by the *Pandits* does not say anything in regard to the point at issue, but only repeats the long established doctrine of this (Bengal) school—a doctrine founded by JÍMÚTA-VÁHANA and the rest on the assumption of several, though unascertained, right in each co-sharer of a joint property, in contradistinction to the doctrine of all the co-sharers having a common right in every part of the joint property—a doctrine maintained by the lawyers of the other schools.*

The text of NÁRADA, cited by them as authority, does not also apply to the above point, which is the right of pre-emption, and not the competency of a co-sharer to sell his share in the joint property without the consent of his co-sharer.

The passage of the *Mahá-nirvána Tantra* above quoted is the only one which is expressly and exactly to the point, and according to which the case ought to have been decided.

The *Pandits* without quoting the passage in question, have unscrupulously said:—"The prohibition, in the *Mahá-nirvána Tantra*, of sale of immovable property without the consent of kinsmen, friends, and persons of the same caste, being at variance with the above doctrine, is not approved by any of the Bengal writers." Had they reproduced the said passage in their *Vyavasthá*, and had the same been accurately translated into English, the learned Judges could have seen and judged for themselves, and would not have been warranted to pass, in the above case, such a decision as they have made.

The truth is, that the passage in question does not at all prohibit a co-sharer from selling his share in the joint

* See *ante*, pages 532, 533.

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estate without the consent of his co-sharer, but, on the contrary, admitting and recognizing his power to do so, it only adds that 'when he is to sell his share in the joint property, he must not sell it to a stranger in case his co-parcener, friend or neighbour tender the same price as was offered by the former.' Not understanding this nicety, the *Pandits* have made a great blunder in concluding that the prohibition in the *Mahá-nirvána Tantra* is at variance with the above doctrine (*viz.*, that of a co-sharer's competency to sell his undivided share of the joint estate without the consent of his co-sharer), though in reality it favors the above doctrine and adds thereto the salutary clause as above mentioned.*

Then as to their saying—"The prohibition in the *Mahá-nirvána Tantra* * * * is not approved by any of the Bengal writers,"—it is quite unfounded and erroneous. In the first place, the above prohibitory doctrine of the said *Tantra* is quite distinct from the doctrine of JÍMÚTA-VÁHANA and other Bengal writers recognizing a co-sharer's competency to sell his share of the joint property without the consent of his co-sharer; secondly, none of the Bengal writers has said, nor could they venture to say, a single word against the ordinances of the *Mahá-nirvána Tantra*, which is a work of their Great Divinity, MAHÁ-DEVA. The ordinances of this sacred work are followed by the Hindús as next to those of the *vedas*, and the *Tantra* is (in many respects) substituted for any of the *vedas* (at least in Bengal and *Mithilá*). The rules laid down in the said *Tantra* are therefore not only superior and preferable to the doctrines of the *Dáya-bhága* and other law books of the Bengal writers, but also to the institutes of our holy Legislators. So, far from disapproving, the Bengal writers could not but revere the above prohibitory ordinance as being the rule laid down for their guidance by their Great Deity, MAHÁ-DEVA.

Further, some of the holy Legislators have laid down: "If there be a contradiction between a *Shruti (Veda)* and *Smriti* (Code of law), the former is to be followed in practice in preference to the latter; but if there be no such distinction, the *Smriti* should be acted upon by the virtuous just as the *Vedas*."† "Should there be a contradiction between *Shruti* and *Smriti*, the former must be followed without consideration of any matter."‡ "Wherever contradictions exist between *Shruti*, *Smriti* and *Purána*, there the *Shruti* is preferable; but where a contradiction exists between *Smriti* and

* See *ante*, pages 643, 644.

† JÁBÁLI. See the Preface. ‡ *Bhavishya-purána*. See *Ibid.*

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Purána, there the *Smriti* is held in preference."* "If two texts (of sages) differ, reason (or that which it best supports) must in practice prevail."† "A decision must not be made solely by having recourse to the written Codes, since, if no decision were made according to the reason of the law (or immemorial usage), there might be a failure of Justice."‡ Now the *Mahá-nirvána Tantra* being held equal in sanctity to the *Vedas*, its ordinances should doubtless over-ride even those of the sages; and, as such, they must be followed in preference to the doctrines of the writers of the Bengal school as well as of those of the other schools.

But even if the above quoted ordinance of the *Mahá-nirvána Tantra* be not considered superior to the rules laid down in any of the Institutes of the sages and the Digests of their laws, still it should have been followed in the present instance, partly by reason of its being the only express authority on the subject in question, and partly by reason of its inculcating a doctrine which is not only the most reasonable but also most beneficial and conducive to the social happiness of the Hindús in general.§

Lastly, as to the *Pandits'* saying that—"they (the Bengal writers) hold that a thing forbidden, if done, cannot be cancelled, (that is "*factum valet quod fieri non debuit*"), I think I cannot do better than repeat the words used by Sir William Macnaghten to refute the doctrine in question. He says: "To this it can only be answered, that the motives which actuated the *Pandits* in their exposition of the law, and the Judges in their decision, are avowedly stated on conjecture only, and that if such motives are allowed to operate, there must be an end of all law, the maxim of '*factum valet*' superseding every doctrine, and legalizing every act."|| The fact is, that the maxim in question was introduced by the author of the *Dáya-bhága* with respect to a co-sharer's competency to make a gift or sale of his share in the joint estate; that thereupon the *Pandits* who flourished about the latter part of the last century, declared that a gift or other disposition by a man even of the whole

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* VYÁSA. See the preface. † YÁJNAVALKYA. See *Ibid.*

‡ VRIHASPATI. See *Coleb.* Dig., Vol. II, p. 128.

§ Most conducive to the social happiness &c.] Suppose, for instance, the brother of an orthodox *Bráhmana* turns out a vicious man and an enemy to his brother, and, out of spite, sells his share in the family dwelling-house to a Mahomedan, or Christian, or to a woman of the town (as nothing could check him from so doing, the law of pre-emption not being in force), and one can easily imagine what would, in that case, be the troubles and misery of the poor *Bráhmana* and his family.

|| Macn. H. L., Vol. I, pp. 6, 7.

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of his ancestral property, though sinful and immoral, was valid; and that their opinion was followed by the then dispensers of justice, who at that time had no means of acting independently of the *Pandits*, and thus the doctrine of '*factum valet*' came into operation in our country in regard to alienations by males of their property, but *not* in regard to pre-emption or any other subject or point of law (see *ante*, pages 626—629). Nevertheless, if the above doctrine be extended to the right of pre-emption which (as already shown,) is quite distinct from sale, and other titles of our law, then,—as is justly remarked by Sir William Macnaghten,—there must be an end to all law. Any person will unscrupulously commit an unlawful act, and the same will be rendered valid by the obnoxious maxim of "*factum valet.*"

Sir William Macnaghten, in the preface to his work on Mahomedan Law, cites the said passage of the *Mahá-nirvána Tantra*, and entertaining no doubt as to its authenticity (and none could doubt the authenticity of a work which is sacred to, and revered by, the millions of Hindús*), he simply observes: "but it remains to be decided whether this shall be held to be the practical law or no. The *Pandit* with whom I perused the passage in question declared that the right of pre-emption takes effect only in cases where positive injury would result to the neighbour by the sale to a stranger; and from the tenor of the last sentence, such would indeed seem to be the effect against which the provision is intended to guard."

But what had remained to be decided in 1824 (in which year the learned writer had made the above remark) was actually decided and established in 1830 by the late Sudder Dewany Adawlut in the appeal of Omed Roy *v.* Nukchhed Roy conformably to the said passage of the *Mahá-nirvána Tantra*, the same being considered to be the practical law of pre-emption. See Sel. S. D. A. Rep., Vol. V, (New Ed.,) pp. 85, 86, and also *Vyavasthá-chandriká*, Vol. II, Part ii, pp. 549, 550.

Since that, the (late) Sudder Dewany Adawlut went on admitting the right of pre-emption among the Hindús of the Upper Provinces but denying it among those of Bengal till the 19th of February 1841, when, in a case instituted by one Gooroo-churn Sircar and others of the *Sudgope* caste to establish their right of pre-emption in certain female

* This work was introduced in the *A'di Bráhma Samáj* by so high an authority as Rajah Rammohan Roy, and it is still used there in the performance of services and the like.

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apartments contiguous to their family residence, against the purchase by a decree-holder of the *Kaest* caste, the Court, for the first time, admitted the right of pre-emption in Bengal with reference to the rights, feelings, particular usages and institutions of the Natives of the country, that is, exactly according to the opinion expressed by Sir W. Macnaghten's *Pandit*, and recognised by that gentleman. (1 Sev. Case 27.) But ever since then, unmindful of those rights, feelings, particular usages and institutions of the Natives of Bengal, and regardless of the express ordinance of the *Mahá-nirvána Tantra*, notwithstanding it is an universal authority for *all* the provinces of India, the Sudder, as well as the other Courts of Judicature, have continually denied the right of pre-emption in the cases of Bengal Proper, though by such denial more mischief has been caused here than in Upper India, where it springs only from a single source, namely, vicinage or contiguity of property, while in Bengal, the partial right of a co-sharer in a joint property having been recognized, and he being allowed by his law to sell his share without the consent of his co-parceners, such mischief arises from a double source—Vicinage* and Co-parcenary.

It is, therefore, confidently hoped that taking into their serious consideration how much mischief is occasioned and how much injustice done to the people of Bengal by not recognizing their right of pre-emption, the dispensers of justice will no longer refuse to grant the relief sought by them on the assertion of such right, but with reference to their feelings, social rules, particular usages and institutions, also on consideration of the above ordinance of the *Mahá-nirvána Tantra* being a predominant authority with the Bengal school as well as with the other schools, and also on consideration of part proprietors of landed estates having been allowed by the sale law to purchase the shares of their defaulting co-sharers in preference to strangers, they will be pleased to re-admit the above right of the people of Bengal, and thereby confer a great boon upon millions of the Hindú subjects of Her Gracious Majesty, the Empress of India.

* The non-enforcement of the right of pre-emption on the ground of vicinage or contiguity of property is eminently mischievous, as it does not unfrequently happen that a less powerful landowner, harrassed by frequent encroachments and incursions of his more powerful and covetous neighbour, whom nothing short of the annexation of that property to his estate will satisfy, and unable himself to cope with him, sells his property not to that neighbour, but maliciously to some one else who, he fancies, will be a match for him, and thus serious quarrels, affrays, and litigations, civil and criminal, ensue, and continue until one, or both, of them are ruined. But these evils would have been avoided had the right of pre-emption been recognized, as in that case a co-proprietor or neighbour maliciously intending to alienate his share or property would be compelled to sell it to his co-sharer or neighbour, and thus there would be an end of further mischief and loss.

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SECTION II.

On Religious Endowments.

Vyavasthá. **717.** Property, endowed by a man for religious purposes or dedicated by him to the worship or service of a deity, can be resumed neither by him nor by his heirs and the rest, nor is it heritable as a private property, nor divisible among the co-heirs, nor alienable at all, except under necessity to defray the expenses required for the support of the temple or institution.

Vide Precedents, pages 211, 690—693, 910—917.

Reason. Because ceasing to belong to the endower it then became the property of the idol or institution to which it was dedicated or endowed. Consequently,—

Vyavasthá. **718.** The man so dedicating or endowing a property can no longer exercise ownership over it, though he can hold the management thereof for its appropriate object in his own hands or delegate it to another. And not the property, but its management, passes by inheritance in the case of the endower being a householder (*grihí*), and by usage, in the case of his not being so.

Vide Precedents, pages 298—321, 690—693, 910—917.

Authority. The gift so made or its apropriation made by a man for religious uses, cannot be set aside by his son and the rest. The giver is competent to take care of the wealth or property endowed for pious purposes. He can no longer resume it, because *Dharma** is the then master or owner of such property. Let the owner himself or his representative,

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Annotations.

717, 718. It may be added here, that lands endowed for religious purposes are not heritable at all as a private property, though the management of them for their appropriate object passes by inheritance, subject to usage, as in the case of many of the religious establishments in Bengal.—*Stra.* H. L., Vol. II, p. 151.

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* Virtue; virtue personified, born from the right breast of *Brahmá*, the first deity of the Hindú triad, and the operative creator of the world.

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O Goddess! appropriate to pious purposes the corpus (of a property,) or its income according as it may have been resolved.*—*Mahá-nirvána-tantra*, Sect. 12, verses 92—94.

He who seizes the subsistence of the Gods and priests, whether given by himself or another, is born a reptile in ordure for a million of million years.—*Srimad-bhágavata*, Sec. xi. Authority.

SECTION III.

On interest, &c.

On this subject it is ordained by—

Kátyáyana:—Stipulated interest [*kárita*] is that which has been especially [and freely] promised by the debtor, in a time of extreme distress, above the allowed rate. When any one pays interest from time to time, it is recorded as *shikhá-vriddhi*, or hair-interest.—Though a lent loan be made [expressly] without interest [*uddhára*], yet, if the debtor pay not the sum lent after demand, but (fraudulently) go to another country, that sum shall carry interest after a lapse of three months. A debtor, who even residing in his own country, pays not [the debt,] after more demands than one, shall be forced, however unwilling, to pay interest on it, though not stipulated [after the lapse of one year].—What has been amicably lent for use shall bear no interest until it be demanded back, but if, on demand, it be not restored, it shall bear interest [on its true value], at the rate of five in the hundred.—Should a man having bought a marketable commodity, [fraudulently] go to another country, without paying the price of it, that price shall bear interest after three seasons [or six months].—[Even] without a journey [to a foreign country], a deposit, the balance of interest, a commodity sold, and the price of a commodity purchased, not being paid [or delivered] after demand, shall bear interest at the rate of five in the hundred

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* The passage (in original), of which the above is a translation, is as follows:—

धनमेवं विधानेन दत्तं वा धर्म्मसातृकतम् ।
पुंसा तदन्यथा कर्त्तुं पुत्राद्यैर्नैव शक्यते ॥ ९२ ॥
धर्म्मार्थं स्थापितं रिक्थं दाता रक्षितुमर्हति ।
न प्रभुः पुनरादातुं धर्म्मो ह्यस्य यतः प्रभुः ॥ ९३ ॥
मूलं वा तदुपस्कारं यथासङ्कल्पमन्विते ।
स्वयं वा तत्प्रतिनिधिर्धर्म्मार्थं विनियोजयेत् ॥ ८४ ॥

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[if the debtor be a *Shúdra*].—He who having received a chattel lent for use, goes to a foreign country without restoring it, must pay interest, according to the value of it, after one year.*—*Vyav. Mayú.*, Chap. V, Sect. i, § 2—4.

NÁRADA :—There shall be no interest, without a special agreement on valuable things lent through friendship [for use, not for consumption] ; but even without agreement, property so lent, bears interest after half-a-year.—A commodity, the price [of a commodity], wages, a deposit, and [the like], a fine [to the king], a thing clandestinely taken [without a design to steal it], a thing idly promised, and a stake played for, carry no interest [before demand], without a special agreement.(*a*)—*Ibid.*, § 4, 5.

(*a*) *Without a special agreement*, not positively declared.—*Ibid.*, § 5.

VISHNU :—In all the classes, if a person borrow money under agreement, as 'I will repay it to-morrow,' but should for his own profit not pay it, the lender shall receive interest from after [the term fixed].—*Ibid.*, § 4.

YÁJNAVALKYA :—Property lent, which the creditor will not receive back when tendered, must be deposited with a third person, and bear no interest afterwards.—*Ibid.*, § 5.

MANU :—If he take a beneficial pledge, *or a pledge to be used for his profit*, he must have no other interest on the loan ; nor, after a great length of time, *or when the profits have amounted to the debt*, can he give or sell such a pledge, though he may assign it in pledge to another.—A pledge *to be kept only*, must not be used by force, *that is, against consent :* the pawnee so using it must give up his whole interest, or must satisfy the pawner, *if it be spoiled or worn out*, by paying him the original price of it; otherwise, he commits a theft of the pawn.—Neither a pledge *without limit*, nor a deposit, is lost to the owner by lapse of time: they are both recoverable, though they have long remained with the bailee.—Let no lender *for a month, or for two or three months, at a certain interest*, receive *such* interest beyond the year ; nor any interest, which is unapproved ; nor interest upon interest by *previous agreement*, nor monthly interest exceeding in time the amount of the principal,† nor interest exacted from a debtor *as the price of the risk, when there is no public danger or distress ;* nor immoderate profits from a pledge to be used by

* *Vide Colebr.* Dig., (Cal. Ed.), Vol. I, pp. 1—49.

† *Vide* Precedents, pp. 917—919.

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way of interest.—He, who cannot pay the debt *at the fixed time,* and wishes to renew the contract, may renew it in writing, *with the creditor's assent,* if he pay all the interest then due.—But, if, *by some unavoidable accident,* he cannot pay the whole interest, he may insert *as principal* in the renewed contract so much of the interest accrued as he ought to pay.—Chapter VIII, *Vachanas* or verses, 143—145, 153—155.

The Rates of Interest are thus propounded by—

VYÁSA :—Monthly interest is declared to be an eightieth part of the principal, if a pledge be given; a sixtieth part is to be paid, if there be [only] a surety; and if there be neither pledge nor surety, two in the hundred [may be taken from a debtor of the sacerdotal class].*

YÁJNAVALKYA :—An eightieth part of [of the principal] is the monthly interest, when a pledge has been delivered; otherwise it may be, in the direct order of the classes, two, three, four, or five in the hundred.—All borrowers, who travel through vast forests, may pay ten, and such as traverse the ocean, twenty in the hundred.*

They must pay it as shown by the last half of the couplet :—"To lenders of all classes [according to circumstances]; or whatever interest has been stipulated by them [as the price of the risk to the lender]."*

VISHNU :—But a creditor may receive interest at due rates from his debtor, or *may take from him,* in the direct order of all the classes, two, three, four, or five in the hundred by the month.†—*Vivádá-bhangárnava.*

GOUTAMA :—The legal interest for twenty *palas* (*d*), is five *máshas* (*b*) a month.†—*Ibid.*

VASHISHTHA :—Hear the interest for a money-lender declared by the words of VASHISHTHA: Five *máshas* (*b*), *or one suvarna* (*c*), for twenty *palas* (*d*), *or eighty suvarnas,* he may claim *and should receive* each month :‡ thus the law is not violated.†—*Ibid.*

(b) "*Másha*"—a weight equal to 5, 8 or 10 *Ratis* (or seeds of the *Abrus precatorius*); the weight in common use is about seventeen grains Troy.

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* *Vyav. Mayú.*, Chap. V, Sect. i, § 3.

† *Vide Coleb.*, Dig., Vol. I, (Cal. Ed.), pp. 30—45.

‡ MANU, after saying "a lender of money may take the interest allowed by VASHISHTHA," adds, "eightieth part of a hundred." Since it is thence inferred, that VASHISHTHA has propounded the rate of an eightieth part, his text must be so explained, as to state an eightieth part.—*Coleb.* Dig., Vol. I, (Cal. Ed.), p. 31.

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(c) "*Suvarna*"—a weight equal to sixteen *máshas.*

(d) "*Pala*"—a weight equal to four *Suvarnas* or *Karshas,* which last is also a weight equal to sixteen *máshas.*

MANU:—A lender of money may take, in addition to his capital, the interest allowed by VÁSHISHTHA, *that is,* an eightieth part of a hundred, *or one and a quarter,* by the month, *if he have a pledge*;—or, if he have no pledge, he may take two in the hundred *by the month,* remembering the duty of good men: for, by *thus* taking two in the hundred, he becomes not a sinner for gain.—He may thus take, *in proportion to the risk, and* in the direct order of the classes, two in the hundred *from a priest,* three *from a soldier,* four *from a merchant,* and five *from a mechanic or servile man,* but never more, as interest by the month.—Interest on money received at once, *not month by month, or day by day, as it ought,* must never be more than enough to double the debt, *that is, more than the amount of the principal paid at the same time*:* on grain, on fruit, on wool, on hair, on beasts of burden, *lent to be paid in the same kind of equal value,* it must not be more than enough to make the debt quintuple.—Stipulated interest beyond the legal rate, and different from the *preceding* rule, is invalid; and the wise call it an usurious way *of lending*: the lender is entitled *at most* to five in the hundred.—"He, who cannot pay the debt *at the fixed time,* and wishes to renew the contract, may renew it in writing, *with the creditor's assent,* if he pay all the interest then due. But if, *by some unavoidable accident,* he cannot pay the whole interest, he may insert *as principal* in the renewed contract so much of the interest accrued as he ought to pay. Whatever interest, *or price of the risk,* shall be settled *between the parties,* by men well acquainted with sea-voyages or journies by land, with times and with places, such interest shall have legal force."—Chapter VIII, *Vachanas* or Verses 140—142, 151, 154, 155, 157.

According to KULLÚKA-BHATTA, CHANDESHWARA, BHAVADEVA, VÁCHASPATI, MISRA, and others, an eightieth part *of the principal* is the *monthly* interest, when a pledge is delivered, but two in the hundred, if there be no pledge.† *Viváda-bhangárnava.*

NÁRADA:—"Of interest on loans, this is the universal (*e*) [and highest rule]; but the rate customary in the

* *Vide* Precedents, pp. 917—919.

† *Coleb.* Dig., Vol. I, (Cal. Ed.), p. 44.

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country where the debt was contracted, may be different."—*Vyav. Mayú.*, Chap. V, Sect. i, § 7.

(e) '*Universal*'—everywhere current; and this relates only to a debt doubled, or more than doubled, by interest, by the first transaction; for, if at a different time a fresh speculation be entered into, with a different person, or even with the same, under a chance of profit or loss, in such case, even higher interest may accrue. So also MANU:—"Interest on money received, at once, [not month by month, or day by day, as it ought,] must never be more than enough to double the debt, [that is, more than the amount, of the principal paid at the same time]. But in any one case where it is realized [by degrees], or at various times also, more than this legal or allowable interest may be levied, according to VIJNÁNESWARA and other authorities.*—*Ibid.*

SECTION IV.

REMARKS ON PARTICULAR CONTRACTS.

As a contract made by an outcast or degraded is void, so also are the contracts made by those who have quitted the order of a householder, or are otherwise civilly dead.*

Although a text declares 'wealth common to the married pair' (3 Dig., 488), yet it is a general rule that the husband alone has power to make contracts of such property, coverture incapacitating a woman from all contracts in respect of property not exclusively her own, but those contracts are valid and binding which are made by wives, the livelihood of whose husbands chiefly depends on their labour; so also are those made for the support of the family, during the absence or disability, mental or corporeal, of the husband.†

Among persons who are competent to make a contract the maxim of '*caveat emptor*' applies. Thus NÁRADA ordains: "A buyer ought at first himself to inspect the commodity, and ascertain what is good and bad in it; and what after such inspection he has agreed to buy, he shall not return to the seller, *unless it had a concealed blemish.*‡

A gift may be revoked if made under a mistake; and by analogy to this rule, every contract is vitiated by error.†

* *Vide Coleb.*, on Oblig., and Cont., p. 80.

† See fit, unfit and void gifts; *Coleb.* Obl. and Cont. Book 2, Ch. VII, § 102; and Macn. H. L., Vol. I, pp. 122, 123.

‡ KÁTYÁYANA and NÁRADA cited in 2 Dig., 323, 325. See Macn. H. L., Vol. I, p. 124.

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Any species of duress vitiates a contract.

Thus MANU:—What is given by force *to a man who cannot accept it legally*, what is by force enjoyed, by force caused to be written, and all other things done by force *or against free consent*, MANU has pronounced void.—Chap. VIII, *v.* 168.

JAGAN-NÁTHA, commenting on the text of NÁRADA, to the effect that what a man does while disturbed from his natural state of mind, is void, observes: "In cases of fear and compulsion, the man is not guided solely by his own will, but solely by the will of another. If he, terrified by another, give his whole estate to any person for relieving him from apprehension, his mind is not in its natural state; but after recovering tranquillity, if he give anything in the form of recompense, the donation is valid."(1)

Any fraudulent practice vitiates a contract: and in a contract of sale, if the vendor, having shown a specimen of property free from blemish deliver blemished property, the vendee may return it at any time, and the vendor is liable to pay a fine and damages on account of his dishonesty.* See *ante* pp. 617, 618.

It is a general principle of Hindú law that the head of a family is answerable for necessaries supplied for the indispensable use of it, and for the subsistence of the persons whom he is bound to maintain, whether it be his wife, his parent, his child, his slave, his servant, his pupil, or his apprentice, to whom the necessaries are furnished, and goods indispensably requisite, are delivered.*

In recapitulating the causes of incapacity, YÁJNAVALKYA observes: "A contract made by a person intoxicated, insane, diseased, grievously disordered, or disabled, by an infant, or a man agitated by fear or the like, or (in the name of another) by a person without authority, is utterly null."

Annotations.

(1) This corresponds with what has been stated by Mr. Colebrooke in his Treatise on Obligations and Contracts (Ch. VI, § 109), that though by the Hindú law things done by force are pronounced null, yet in fact they are, in every system of jurisprudence, *voidable* rather than *void;* as they are susceptible of confirmation by assent subsequent, whether express or tacit.

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* See *ante*, pp. 134—136, and *Coleb.* Obl. and Cont. Book ii, § 49. See also Maen. H. L., pp. 124—126.

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The above passage is thus commented upon by JAGANNÁTHA :—"Singly the gift of wages by a man possessing his senses, is valid; joined with madness or the like, the intentional payment of wages during a lucid interval may also be valid; but singly a gift by a man affected by insanity or the like, is void." From this comment the principle may be deduced, that, the act of a lunatic may be effectual if the contract be onerous and the agreement rational, on the presumption of the act having been done during a lucid interval; but that, where it may be prejudicial to him and unattended with any benefit, it should be held to be *ipso facto* void. See Macn. H. L., Vol. I, pp. 125, 126.

So also the validity of a deed executed by a man in his last illness should be upheld, if it be proved that he was of sound mind at the time of its execution: but otherwise, if it appear that his mind was not in its natural state.*

Hindú gifts are not binding on representatives: and in a case where a person contracted to pay to another a sum of money in consideration of that person's giving his daughter in marriage to the son of the contracting party, it was held that the contract was not binding after his death; the law not permitting money to be given for a bride, and the consideration consequently not being a legal one; and it should be observed, that, in all such cases the turpitude is considered to be on the side of the receiver, the giver not being deemed to have seriously intended to give.†

It would be superfluous to enter into further disquisition relative to the law of contract, bailments, or other matters connected with judicial proceedings, as at present Hindú law on those subjects are rarely applied in practice.

SECTION V.

ON EMIGRATING FAMILIES.

719. A family, migrating from one country to another, is entitled to the benefit of the law of the former country, provided it have uniformly observed the customary ceremonies, and the religious rites ordained by the law, of such country;—otherwise, it must be governed by the laws of the latter country. *Vyavasthá.*

Vide Precedents, pages 926—933.

* *Vide* Precedents, pp. 848, 849, 850.

† See Macn. H. L., Vol. I, p. 128.

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Vyavasthá. **720.** It has, moreover, been determined that a Hindú family migrating from one country to another must be presumed, until the contrary be proved, to have brought with it its customs and laws on all subjects including marriage, succession, adoption, &c., and the religious ceremonies ordained by those laws.

Vide Precedents, pages 929—931.

SECTION VI.

On the castes and classes of the Hindús.

Originally there were four castes:—the *Bráhmana, Kshatriya, Voishya* and *Shúdra.* The first three of these are called *dwijáti* or *dwija* (twice-born),* they being considered as born again by initiation in the rite of *upa-nayana* (investiture with the sacred thread).

In ages other than the present (*kali*), intermarriages having been allowed by law, and followed in practice, amongst the four primitive or pure castes, there became several mixed (*sankara*) castes.†

The sons by women one degree lower than their husbands, are named in order the *Múrddhábhishikta,*‡ *Máhishya,* and *Karana* or *Káyastha.*§ They are respectively begotten by

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* The three twice-born classes are the sacerdotal, the military, and the commercial; but the fourth, or servile, is once born, that is, has no second birth from the *Gáyatrí*, and wears no thread: nor is there a fifth pure class.—Manu, Ch. X, *v.* 4.

† In all classes they, and they only, who are born, in a direct order, of wives equal in class, and virgins at the time of marriage, are to be considered as the same in class (with their fathers:)—Sons, begotten by twice-born men, on women of the class next immediately below them, wise legislators call similar, (not the same,) in class (with their parents,) because they are degraded, (to a middle rank between both,) by the lowness of their mothers. Manu, Ch. X, *v.* 5-6.

‡ Persons of this caste are called also "*Bhúmhár*" or land-holder (from '*bhúm*' land, and '*hár*' taker), and commonly *Bhúinhár.* The *Bhúmhárs* are called *Bráhmanas,* but they only *partially* perform the duties and functions of pure *Bráhmanas,* that is, they give alms to *Bráhmanas* but do not receive them as such, they read the *Vedas* but do not teach them, they offer sacrifices but do not personally perform them as priests, and the like. Some of them have the honorific titles of *Kshatriyas,* such as 'Singh, Roy,' &c., but the rest bear the titles and family-names of *Bráhmanas.*

§ The persons of the *Karana* caste are of a mixed race, as is manifest from the above text, and are to be found in the eastern part of Bengal, and are called *Shúdra Káyasthas,* who employ themselves as menial servants. They are not the *Srivásta* and other *Káyasthas* who are of a pure race.—Vide *Rájá Rádhákánt's Shabda-kalpadruma,* Vol. I, pp. 542—549, and its Appendix, pp 457—466, also the *Shúdra-dharma-tattwa* by *Kamalá-kara Bhatta* and *A'chára-nirnaya-tantra.*

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a *Bráhmana* on a wife of the *Kshatriya* caste, by a *Kshatriya* on a *Voishyá* wife, and by a *Voishya* on a *Shúdrá* wife.*

The sons born of women two or three degrees lower than their husbands are as follow:—"From a *Bráhmana* on a wife of the *Voishya* class, is born a son called *Ambashtha*, or *Voidya*, on a *Shúdrá* wife, a *Nishída*, named also *Párasava*. From a *Kshatriya*, on a wife of the *Shúdra* class, springs a creature, called *Ugra*, with nature partly warlike and partly servile, ferocious in his manners, cruel in his acts.—The sons of a *Bráhmana* by women of three lower classes, of a *Kshatriya*, by women of two, and of a *Voishya*, by one lower class, are called *Apasada*, or degraded below their fathers.—From a *Kshatriya* by a *Bráhmaní* wife, springs a *Súta* by birth; from a *Voishya*, by a military or sacerdotal wife, spring a *Mágatha* and *Voideha*. From a *Shúdra*, on women of the commercial, military, and priestly classes, are born sons of a mixed breed, called *A'yogava*, *Kshattri*, and *Chandála*, the lowest of mortals."—MANU, Ch. X, *Vachanas* or *Verses* 8—12.

There are also compound mixed classes, who are begotten by men of the mixed classes, on women of the mixed classes. They and the different kinds of *Vratyas*, or men not initiated in the ceremonies of assuming the sacred thread, are as follow:—

"From a *Bráhmana*, by a girl of the *Ugra* tribe, is born an *Ávrita*; by one of the *Ambashtha* tribe, an *Ábhira*; by one of the *Áyogava* tribe, a *Dhigvana*. The *Áyogava*, the *Kshattri*, and the *Chandála*, the lowest of men, spring from a *Shúdra* in an inverse order *of the classes* and are, (*therefore*,) all three excluded *from the performance of obsequies to their ancestors*:—from a *Voishya* the *Mágadha* and *Voideha*, from a *Kshatriya* the *Súta* only are born in an inverse order; and they are three other sons excluded *from funeral rites to their fathers*. The son of a *Nishída*, by a woman of the *Shúdra class*, is by tribe a *Pukkasa*; but the son of a *Shúdra* by a *Nishádí* woman, is named *Kukkutaka*. One born of a *Kshattri* by an *Ugrá* is called *Shwapáka*; and one, begotten by a *Voideha* on an *Ambashthí* wife, is called *Vena*. Those, whom the twice-born beget on women of equal classes, but who perform not the proper ceremonies *of assuming the thread and the like*, people denominate *Vrátyas*, or excluded from the *Gáyatrí*. From such an outcast *Bráhmana* springs a son of a sinful nature, *who in different countries* is named a *Bhúrja-kantaka*, an *Ávantya*, a *Vátadhána*,

* *Vide Kullúka-Bhatta's* Commentary on MANU, Ch. X, *v.* 6.

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a *Pushpadha,* and a *Soikha.* From such an outcast *Kshatriya* comes a son called a *Jhalla,* a *Malla,* a *Nichhivi,* a *Nata,* a *Karana,* a *Khasa,* and a *Dravira.* From such an outcast *Voishya* are born sons called *Sudhanwan, Chárya, Kárusha, Vijanman, Moitra,* and *Satwata.* By intermixtures of the classes, by their marriages with women who ought not to be married, and by their omission of prescribed duties, impure classes have been formed."—MANU, Chap. X, *vs.* 15—24.

Those men of mingled births, who were born in the inverse order of classes, and who intermarry among themselves, I will now compendiously describe*:—

The *Súta, Voideha* and the *Chandála,* that lowest of mortals, the *Mágadha,* the *Kshattri* by tribe, and the *Áyogava:* these six beget similar sons on women of their own classes, or on women of the same class with their mothers; and they produce the like from women of the two highest classes, and *of the lowest.* Those six beget on women of their own tribes, reciprocally, very many despicable and abject races, even more foul than their begetters. The six low classes, marrying inversely, beget fifteen yet lower tribes, the base producing still baser; *and in a direct order they produce fifteen more.* A *Dasyu,* or outcast of any pure class, begets on an *Áyogaví* woman a *Soirindhra,* who should know how to attend and to dress his master; though not a slave, he must live by slavish work, and may also gain subsistence by catching wild beasts in toils. A *Voideha* begets on her a sweet-voiced *Moitreyaka,* who, ringing a bell at the appearance of dawn, continually praises great men. A *Nisháda* begets on her a *Márgava,* or *Dása,* who subsists by his labour in boats, and is named *Koivarta* by those, who dwell in *Áryávarta,* or the land of the venerable. Those three of a base tribe are severally begotten on *Áyogaví* women, who wear the clothes of the deceased, and eat reprehensible food. From a *Nisháda* springs *by a woman of the Voideha tribe, a Kárávára,* who cuts leather, and from a *Voideha spring by women of the Kárávára and Nisháda castes,* an *Andhra* and a *Meda,* who must live without the town; from a *Chandála,* by a *Voidehí* woman, comes a *Pándusopáka,* who works with canes and reeds. And from a *Nisháda* an *Áhindika,* who acts as a jailor. From a *Chandála,* by a *Pukkasí* woman, is born a *Sopáka,* who lives by punishing criminals condemned by the king, a sinful wretch ever despised by the virtuous. *A Nishádí* woman, by a *Chandála,* produces a son called *Antyávasáyí,* employed in places for burning the

* MANU: Chapter X, *Vachana* or Verse 25.

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dead, contemned even by the contemptible.—These, among various mixed classes, have been described by their several fathers and mothers; and, whether concealed or open, they may be known by their occupations.*—MANU, Chap. X, *verses* 26—40.

The *Bráhmanas*, partly by reason of residing in the different countries of India, and partly for other reasons, are divided into ten principal tribes or classes. These are—1 *Kánya-kubja* or *Kanojiyá*, 2 *Sáraswata*, 3 *Moithila*, 4 *Goura* or *Gouriyá*, 5 *Utkala*, 6 *Mahárashtra*, 7 *Toilanga*, 8 *Drávida* 9 *Karnáta*, and 10 *Gurjara*.†

The *Gouriya* or Bengali *Bráhmanas* are principally divided into two classes.—The *Rárhí* and *Bárendra*. The *Bráhmanas* who came to Bengal from *Drávira*‡ and *Mahratta* to read the *Vedas* and perform the *Voidika* or *Vedik* rites, &c., are called '*Voidika Bráhmanas*.' These again are divided into two classes.—They whose ancestors came from *Drávira*‡ are called "*Dákshinátya* (Southern) *Voidikas*," and they whose anscestors came from Mahratta are called "*Páshchátya* (Western) *Voidikas*."

Besides, by acting as *Purohits* (priests) of, as well as by accepting or receiving religious donations from, inferior tribes or from the different tribes of the *Shúdras*, many of the *Bráhmanas* have been partially degraded, and have formed, according to their acts or faults, into several subordinate classes: they nevertheless belong to, or are included in, the general classes above mentioned.

Special duties or professions were originally assigned to each of the primitive or pure classes.

Thus MANU:—To *Bráhmanas* he (*Brahmá*) assigned the duties of reading the *Veda*, of teaching it, of sacrificing, of assisting others to sacrifice, of giving alms (if they be rich), and (if indigent) of receiving gifts. To defend the people, to give alms, to sacrifice, to read the *Veda*, to shun the allurements of sensual gratification, are, in few words, the duties of a *Kshatriya*. To keep herds of cattle, to bestow largesses, to sacrifice, to read the scripture, to carry on trade, to lend at interest, and to cultivate land, are prescribed or permitted to a *Voishya*. One principal duty the Supreme ruler assigned to a *Shúdra*,

* See *Parasu-ráma-Paddhati*, *Brahma-Voivarta Purána and Játi-málá*.

† *Vide* Steel's Summary of Laws and Customs of Hindú Castes, and Sherring's Hindú Tribes and Castes as represented in Benares.

‡ See the Preface.

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namely, to serve the before mentioned classes, without depreciating their worth.—Chap. I, *vs.* 88—91.

The duties and occupations of some of the mixed classes also have been ordained, as is apparent from the texts describing them.

The profession or duty of the *Ambashtha* or *Voidya* caste is to be physicians and to prescribe or administer medicines.

On Káyasthas.

It appears from the *Vyoma-Sanhitá** and *Vijnána-Tantra,* also from the *Sanhitás** of NÁRADA, YÁJNAVALKYA, YAMA, VRIHASPATI, and VYÁSA, also from *Kála-pravâha, Skanda-purána, Padma-purána,* and *Bhavishya-purána,* and also from the *Mitákshará, Víra-mitrodoya,* &c.; that *Káyasthas* formed a division of the *Kshatriya* caste, and that they differed from the other *Kshatriyas* only in not being soldiers and warriors as they are, but accountants and writers, by profession; that CHITRA-GUPTA who is the clerk or assistant of (the first) YAMA,† and is himself called the fourteenth YAMA, came out of the arm of BRAHMÁ,‡ and was called *Káyastha* by reason of his having remained in the arm or body of that divinity; that it was ordained by BRAHMÁ that although CHITRA-GUPTA and his descendants being *Kshatriyas* should marry the daughters, and observe the religious ceremonies, of that caste, yet, by profession, they must not be soldiers and warriors as the other *Khatriyas* are, but accountants, writers, and readers.

The following are some of the authorities for the above.

BRAHMÁ said :—

Proceeding from my body (*káya*) and therefore being called '*Káyastha,*' you will be known in the world by the name 'CHITRA-GUPTA.' On receipt of my order, which is unshakable, your perpetual stay, O child, will be at the mansion of the DHARMA-RÁJA,§ to Judge virtue from vice.—

---

* Arrangements of the *Vedas* into short sentences and denominated after the person or persons by whom the arrangement was originally made. Institutes of the sages or holy legislators, collections more or less compressed of laws, legends, &c.

† The Deity of the *Naraka* or hell where his capital is placed, in which he sits on judgment on the dead, and distributes rewards and punishments sending the good to *Swarga* or heaven and the sinner to the division of *Narakas* or Tartarus appropriated to their crimes. He corresponds with the Grecian God PLUTO, and Judge of hell MINOS. He is the son of SURYYA the sun.

‡ The first Deity of the Hindú Triad, and the operative creator of the world.

§ A name of YAMA, regent or Judge of the dead.

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You, O my son, should observe the religious duties observable by the *Kshatriyás* according as ordained. You will produce children, who will live in the world.(1)—*Bhavishya-purána.*

In the beginning of the world, BRAHMÁ, for the purpose of being informed of the good and bad acts of the rational beings, remained for a moment in meditation, and from his whole body came out a being called 'CHITRA-GUPTA,' who was employed in the Court of the DHARMA-RÁJA to record the good and bad acts of the rational beings. As he (CHITRA-GUPTA) proceeded from the body (*káya*) of BRAHMÁ, he is, therefore, called 'a *Káyastha*' by caste. His descendants in the world are *Káyasthas* of different *gotras.**(2)—*Padma-purána*, the chapter on creation.

BRAHMÁ said:—

"Why are you sorry in mind, O child, while I am your protector? Hundreds of *Kshatriyas* have proceeded from (my) arm, so you, a great personage, are born of my arm.

Annotations.

ब्रह्मोवाच—

(१) मच्छरीरात् समद्भूतः, तस्मात् कायस्थसंज्ञकः ।
चित्रगुप्तेति नाम्ना वै, ख्यातो भुवि भविष्यसि ॥
धर्म्माधर्म्मविवेकार्थं धर्म्मराजपुरे सदा ।
स्थितिर्भवतु ते वत्स, ममाज्ञां प्राप्य निश्चलाम् ॥
क्षत्रधर्म्मोचितो धर्म्मः पालनीयो यथाविधि ।
प्रजाः सृजस्व भो पुत्र, भुवि भावसमन्विताः ॥
भविष्यपुराणे ।

(२) सृष्ट्यादौ सदसत्कर्म्मलेखाय प्राणिनां विधिः ।
ध्यानाधाने स्थितस्तस्य सर्व्वकायाद्धि निर्गतः ॥
चित्रगुप्त इति ख्यातो धर्म्मराजसमीपतः ।
प्राणिनां सदसत्कर्म्म-लेखाय स नियोजितः ॥
ब्रह्मकायोद्भवो यस्मात् कायस्थो जातिरुच्यते ।
नानागोत्राश्च तद्वंश्याः कायस्था भुवि सन्ति वै ॥
पाद्मे सृष्टिखण्डे ।

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* See *ante*, page 174.

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By reason of being proceeded from the same part (of my body), you also are of the *Kshatriyá* caste : you will shine in the world famed as '*Káyastha Kshatriya.*' They who will descend from your lineage will also become equal to you (in caste). Their occupation will be writing and the like, and they will be apt to marry *Kshatriyás* (*i.e.*, *Kshatriyá* women.) Obedient to my command, they will observe all those initiatory ceremonies and (religious) acts which are observed (among the persons of the) *Kshatriya* caste." Having said this, PRAJÁPATI the Lord (*i. e.* BRAHMÁ) disappeared there and then. Thus addressed (by BRAHMÁ), CHITRA-GUPTA, always remained delighted in heart.(3)—Texts cited by KAMALÁKARA BHATTA from the *Vrihat Brahma Khanda*, of *Padma* and *Skanda-puránas.*

'*Ka* (क) is the name of PRAJÁ-PATI (BRAHMÁ), and *áya* (आय) is (*i. e.*, signifies) an arm : having remained therein and proceeded therefrom, (CHITRA-GUPTA) is famed a '*káyastha.*'(4)—*Kála-pravâha.*

Proceeding from the body of BRAHMÁ, and bearing the surname '*Barmá,*' the *Káyastha* is, O king, a *Kshatriya*

Annotations.

(३) वत्स ते किं मनोदुःखं मयि तिष्ठति धातरि ।
क्षत्रिया बाहुसम्भूताः शतं मद्बाहुजो महान् ॥
भवान् क्षत्रियवच्च समस्थान-समद्भवात् ।
कायस्थः क्षत्रियः ख्यातो भवान् भुवि विराजते ॥
त्वद्वंशसम्भवा ये वै तेऽपि त्वत्समतां गताः ।
तेषां लेखादिवृत्तिश्च क्षत्रिया-रत-तत्पराः ॥
संस्कारादीनि कर्म्माणि यानि क्षत्रियजातिषु ।
तानि सर्व्वाणि कार्य्याणि मदाज्ञावशलक्षिताः ॥
उक्त्वा प्रजापतिरिदं तत्रैवान्तर्दधे विभुः ।
एवमुक्तश्चित्रगुप्तः प्रसन्नहृदयः सदा ॥
पद्मस्कन्दपुराणान्तर्गतबृहद्ब्रह्मखण्डवचनं कमलाकरभट्ट-
निबद्धम् ।

(४) कः प्रजापतिराख्यातः, आयो बाहुस्तथैव च ।
तत्रस्थः तत्समुद्भूतः कायस्थ इति कीर्त्तितः ॥
कालप्रवाहः ।

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in the *Kali* age in (the matter of) *Japa** and *Yajna*.(5)†—
A text of *Vyoma-Sanhitá* cited by MÁDHAVÁCHÁRYYA.

BRAHMÁ said:—

As you, who are named 'CHITRA-GUPTA' have proceeded from my body, will be celebrated in the world as '*Káyastha*.' *Káyastha* is a *Kshatriya* by caste, but not a *Shúdra* by any means. There must, therefore, be (observed by him) the ten initiatory ceremonies beginning with conception.—1, The ceremony of conception (*garbhádhána*) is to be performed on menstruation, 2, that of *punsavana*,‡ in the third month, 3, *Símantonnayana*,§ in the eighth month of (conception), 4, *Játakarma* upon birth‖ (of the child),—5, *Námakarana*¶ on the tenth day (after the child's birth), 6, *Nishkramana*** in the fifth month, 7, *Anna-prásana*†† in the sixth month, 8, *Chúrákarana*‡‡ according to the (usage of the) family, and 9, in (*i.e.*, after) *Upanayana*§§ should be performed the acts of begging alms (*Bhikshá*), *Brahma-Charyya Vrata*, &c. (that is, studying the *Vedas* by staying in the family of the preceptor), the *Mátriká-*

Annotations.

(५) ब्रह्मकायसमद्भूतः कायस्थो वर्म्मसंज्ञकः ।
कलौ हि क्षत्रियस्तस्य जपयज्ञेषु भूपते ॥
माधवाचार्य्यधृतव्योमसंहितावचनम् ।

---

* Repeating inaudibly the name of a deity or a passage from the *Veda* or *Tantra*.

† A sacrifice or a ceremony in which oblations are presented.

‡ The initiatory ceremony performed on the mother's perceiving the first signs of a living conception.

§ A purificatory or sacrificial ceremony observed by women in the fourth, sixth or eighth month of their pregnancy.

‖ A ceremony ordained on the birth of a male, before the section of the naval string, and which consists in making taste clarified butter out of a golden spoon.

¶ The ceremony of giving a name, performed on the tenth, eleventh, twelfth, or even the hundred and first day.

** The ceremony of carrying the child out of the house to see the moon or the sun.

†† The ceremony of feeding the child with rice in the sixth or eighth month.

‡‡ The ceremony of tonsure performed in the second or third year after birth.

§§ Investiture with the mark of the class, that is, the sacred thread.

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púja,* *Basudhárá*,† and acts for prosperity and welfare, and then 10, the principal ceremony after the performance of the *Nándí-mukha Shráddha*‡ with curd, honey and clarified butter. This is said to be the rule.(6)

Among the YAMAS, CHITRA-GUPTA is enumerated to be the fourteenth. In the *mantra*,§ and *tarpana*.|| he is said to be the fourteenth. In the *Vrihat A'ranyaka Upanishad*, YAMA is plainly mentioned to be *Kshatriya*.

Annotations.

ब्रह्मोवाच—

(६) नाम्ना त्वं चित्रगुप्तोऽसि मम कायादभूर्यतः ।
तस्मात् कायस्थ-विख्यातिर्लोके तव भविष्यति ॥
कायस्थः क्षत्रियो वर्णो न तु शूद्रः कदाचन ।
अतोभवेयुः संस्कारा गर्भाधानादिका दश ॥
गर्भाधानमृतौ कार्य्यं तृतीयमासि पुंसक्रिया ।
मासेऽष्टमे स्यात् सीमन्त उत्पत्तौ जातकर्म्म च ॥
दशाहे नामकरणं पञ्चमे मासि निष्क्रमः ।
षष्ठेऽन्नप्राशनं मासि चूडा कार्य्या यथाकुलम् ॥
तथोपनयने भिक्षा ब्रह्मचर्य्य-व्रतादिकम् ।
वासो गुरुकुलेषु स्यात् स्वाध्यायाध्ययनं तथा ॥
कृत्वा तु मातृका-पूजां वसोर्धारां विधाय च ।
कायुष्याणि च शान्त्यर्थं जपेदत्र समाहितः ॥
कुर्य्यान्नान्दीमुखं श्राद्धं दधिमध्वाज्यसंयुतम् ।
ततः प्रधानसंस्कारः कार्य्या एष विधिः स्मृतः ॥
विज्ञान-तत्त्वम् ।

---

* Worship of divine mothers, a complete enumeration of whom is sixteen, namely, *Gouri*, *Padmá*, *Sáchí*, *Medhá*, *Sávitri*, *Vijayá*, *Jayá*, *Devasená*, *Swadhá*, *Swáhá*, *Sánti*, *Pushti*, *Dhriti*, *Tushti*, *A'tma-devatá* and *Kula-devatá*.

† Pouring of clarified butter on a wall in honor of the god named *Chedirája Basu*.

‡ A Shráddha or funeral obsequies performed on joyous occasions, as initiation, marriage, &c., in which nine balls of meat are offered to the deceased father, paternal grandfather, and great-grandfather; to the maternal grandfather, great-grandfather, and great-great-grandfather; and to the mother, paternal grandmother, and paternal great-grandmother.

§ A mystical verse or incantation sacred to any individual deity.

|| A religious rite, presenting water to the manes of the deceased or to the *pitris* collectively; also to the gods either generally or individually.

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VIJNÁNESHWARA in the chapter on the duties has thus interpreted the meaning of the word '*Káyastha*' :—

"*Káyasthas* are accountants, writers, and king's favorites."

After killing ARJUNA,* and continually darting sharpened arrows, RÁMA, (*i.e.*, PARASU-RÁMA) chased the invalid Rájás for the purpose of killing them.—The pregnant wife of CHANDRA-SENA repaired to the abode of (the saint) DÁLBHYA. Subsequently RÁMA having arrived at the excellent abode of DA'LBHYA, (said to him,) O holy saint! the pregnant wife of the pious king and magnanimous *Kshatriya* CHANDRA-SENA has come to your abode; so, O great sage, deliver to me my required object that I may kill her. Then DÁLBHYA addressed him (saying), I shall give your desired object, but, pray, let me have the child which is in her womb. Thereupon RÁMA said to DÁLBHYA :—"You are wanting that for which I, the annihilator of the *Kshatriyas*, am come. The excellent fœtus required by you, O pure *Bráhmana*, is in the body or womb (of its mother), it will therefore bear the auspicious appellation '*Káyastha*.' As this *Káyastha* being begotton by a *Kshatriya* and born of a *Kshatriyá*, a *Káyastha's* duties are therefore assigned to him" (duties which are said to be of CHITRA-GUPTA.)(7)

Annotations.

(७) एवं हत्वार्জ্জুनं रामः सन्धाय निशितान् शरान् ।
अन्वधावत् स तान् हन्तुं सर्व्वानेवातुरान् नृपान् ॥
सगर्भा चन्द्रसेनस्य भार्य्या दाल्भ्याश्रमं यथौ ।
ततो रामः समायातो दाल्भ्याश्रममनुत्तमम् ॥
तवाश्रमे महाभाग सगर्भा स्त्री समागता ।
चन्द्रसेनस्य राजर्षेः क्षत्रियस्य महात्मनः ॥
तन्मे तां प्रार्थितां देहि हिंसेयं तां महामुने ।
ततो दाल्भ्यः प्रतुवाच ददामि तव वाञ्छितम् ॥
स्त्रिया गर्भमयं बाल्यं तं मे त्वं दातुमर्हसि ।
ततो रामोऽब्रवीद्दाल्भ्यं यदर्थमहमागतः ॥
क्षत्रियान्तकरस्याहं तं त्वं याचितवानसि ।
प्रार्थितस्य त्वया विप्र कायस्थो गर्भ उत्तमः ॥

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* This ARJUNA is the king KÁRTA-VÍRYYA, who is also called 'ARJUNA,' and not that ARJUNA who was the third brother of YUDHISHTHIRA or third of the PÁNDAVAS.

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CHITRA-GUPTA first married a *Bráhmana's* daughter named IRÁVATÍ (born of a *Kshatriyá* wife.) On IRÁVATÍ, CHITRA-GUPTA begotten sons, named, CHÁRU, SUCHA'RU, CHITRA, MATIMA'N, HIMAVÁN, CHITRA-CHA'RU, ARUNA (and) ATÍNDRÍYA; secondly he married DAKSHINÁ, almost a Goddess, and by her, he had four sons, namely, BHA'NU, VIBHÁNU, VISHWA-BHÁNU and VÍRYYAVA'N. These twelve sons spread and settled on earth below.—CHÁRU went to, and resided at Mathurá, whence he was called 'Máthura'. SUCHÁRU lived in the country of Goura (Bengal), and was styled 'Gouríya.' CHITRA went to Bhatta, and was styled 'Bhatta-nágarika.' BHÁNU went to Sríbás and was thence called 'Srívasta.' HIMAVÁN performed devotion to AMBÁ* and was therefore called '*Ambashtha.*'† Accompanied with his wife. MATIMA'N went to, and received the denomination, 'Sakha-Sena.' VIBHÁNU went to Súrasena and was styled SÚRADHWAJA.

Authorities:—

At this very time DHARMA-SARMA', a *Bráhmana*, being desirous to have offspring, worshipped, and performed devotion to, BRAHMÁ. Then by the grace of God, he got a daughter (named) IRÁVATÍ. Subsequently he gave this daughter in marriage to CHITRA-GUPTA. This daughter gave birth to eight sons begotten by CHITRA-GUPTA: namely, CHÁRU, SUCHA'RU, CHITRA, MATIMA'N, HIMAVA'N, CHITRA-CHA'RU, ARUNA, and ATÍNDRIYA. Secondly, he was married to a girl (named) DAKSHINA', almost a Goddess. By her he had four sons: hear their names,—BHÁNU, VIBHÁNU, VISHWA-BHÁNU, and VÍRYYAVÁN. These renowned twelve sons, spread on the earth below. CHÁRU went to Mathurá, and was therefore styled 'Máthura;' SU-CHA'RU (lived) in the Goura country (Bengal), and consequently, O king, he became Gouríya; CHITRA went by water to Bhatta, and was called 'Bhatta-nágarika;' BHÁNU resided in the town of Srí-bás, and was therefore denominated 'Sríbásta;' HIMAVÁN worshipped *Ambá** and was therefore called 'Ambashtha'†; accompanied with his wife, MATIMÁN went

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Annotations.

तस्मात् कायस्थइत्याख्या भविष्यति शिशोः शुभा ।
कायस्थ एव उत्पन्नः क्षत्रियां क्षत्रियात्ततः ॥
दत्तः कायस्थधर्म्मोऽस्मै चित्रगुप्तस्य यः स्मृतः ।
स्कन्दपुराणे रेणुकामाहात्म्ये ।

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* A name of *Durgá*.

† There was also a king named '*Ambashtha.*' See chapter entitled the '*Karna-parva*' of the *Mahábhárata*.

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and received the appellation 'SAKHA-SENA'; and BIBHA'NU went to Sura-Sena and was therefore denominated '*Súra-dhwaja.*' (8)—*Yama-sanhitá.*

The primitive *Káyasthas* of Bengal are descendants of SUCHÁRU who, as already shown, came to, and settled in, *Goura* or Bengal. Subsequently, during the reign of *Rájá A'disura* here came from Kányakubja (Conouj) five *Káyasthas*, named, *Makaranda Ghosha, Dasharatha Basu, Kálidása Mitra, Dasharatha Guha* and *Purushottama Datta,** in company with five learned *Bráhmanas*, who, at the request of the said *Rájá*, were sent to him by the king of Kányakubja to officiate in a sacrifice (*yajna*). The said five *Káyasthas* thenceforward lived in Bengal and their

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Annotations.

(८) एतस्मिन्नेव काले तु धर्म्मशर्म्मा द्विजोत्तमः ।
अपत्यार्थी च धातारमाराध्यमभजत्तदा ॥
परमेष्ठिप्रसादेन लब्ध्वा कन्यामरावतीम् ।
चित्रगुप्ताय तां दत्त्वा विवाहमकरोत्तदा ॥
चित्रगुप्तेन सा कन्या अष्टौ पुत्रानजीजनत् ।
चारुः सुचारुश्चित्राख्यो मतिमान् हिमवान् तथा ॥
चित्रचारुश्चारुश्च अष्टमोऽतीन्द्रियस्तथा ।
द्वितीया देवकल्पेव दक्षिणा या विवाहिता ॥
तस्याः पुत्राश्च चत्वारस्तेषां नामानि वै शृणु ।
भानुस्तथा विभानुश्च विश्वभानुश्च वीर्य्यवान् ॥
पुत्रा द्वादश विख्याता विचेरुस्ते महीतले ।
मथुरायां गतश्चारुर्माथुरत्वमितो गतः ॥
सुचारुर्गौडदेशे तु तेन गौडोऽभवन्नृप ।
भट्टे नदीं गतश्चित्रो भट्टनागरिकः स्मृतः ॥
श्रीवासनगरे भानुस्तस्माच्छ्रीवास्तवाख्यकः ।
अम्बामाराध्य हिमवान् तेनाम्बष्ठ* इति स्मृतः ॥
सभार्य्यो मतिमान् गत्वा शूरसेनत्वमागतः ।
सूरसेनं विभानुश्च तेन सूरध्वजः स्मृतः ॥
यम-संहिता ।

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* See *Káyastha-dípiká.*

descendants are, in intermarriage, &c., mixed with the other *Káyasthas* of the country.

There is, therefore, a preponderance of authority to evince that the *Káyasthas*, whether of Bengal or of any other country, were *Kshatriyas*. But since several centuries passed, the *Káyasthas* (at least those of Bengal) have been degenerated and degraded to *Shúdradom* not only by using after their proper names the *Surname* "Dása" peculiar to the *Shúdras* giving up their own which is "BARMA'," but principally by omitting to perform the regenerating ceremony *Upanayana** hallowed by the *Gáyatrí*.†

Although originally the *Shúdras* were but of one general caste, and had but one general duty or profession, yet the members of this caste have subsequently been divided into many sub-castes or classes; and almost every one of such castes has a peculiar profession assigned. The *Shúdra* castes common in Bengal, and their respective professions, are as follow:—

CASTE OR CLASS.	PROFESSION.
Sad-gopa or *Chásá-Gowálá* ..	Cultivating land, growing and selling vegetables, &c.
Gopa, Pallava-Gopa or *Gowálá* ...	Pasturage and sale of dairy produce.
Gandha Banika, or *Gandha Beniyá* ..	Perfumery and grocery.
Sankha Banika or *Sánkhárí* ...	Preparing and selling blowing conchs, &c.
Kansa Banika or *Kánsárí* ...	Brasiery.
Suvarna Banika or *Sonár Beniyá* ...	Dealing in gold, silver and money.
Telí ... ... / *Tili* ... .. / *Támlí*	Trade, chiefly in grain, &c.
Mályа-kár, málá-kar, or *Máli* . ..	Cultivating flower-gardens and selling flowers, flower garlands, &c.
Karma-kár or *Kámár*	Blacksmith.
Kumbha-kár or *Kumár*	Pottery and making earthen images, and so forth.

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* The investiture with the thread or cord, which regenerates the first three classes, and without which they become *Vrátyas* or degraded.

† A sacred verse which is considered to be the essence (or commonly called to be the mother) of the *Vedas*, which is imparted or taught to every youth of the three superior classes upon receiving his investiture with the sacred thread (*Upanayana*.)

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CASTE OR CLASS.	PROFESSION.
Swarna-kár or *Sekrá*	Goldsmith.
Nápit	Shaving.
Modak, Madhu Nápit or *Moyrá** ...	Preparing and selling sweetmeats.
Kuri	*Ibid.*
Aguri	Principally cultivation.
Tantrabáy or *Tánti*...	Weaving and selling clothes.
Jugi	Weaving and selling cloths, and so forth.
Bháskar	Sculpture.
Bárui	Growing and selling betel leaves.
Nuri	Preparing and selling lac bracelets, and so forth.
Gunrí	Uncertain.
Koivarta† ...	Cultivation, occasionally navigation.
Dhíbar or *Juliyá* ...	Fishing, and selling fish, and making nets.
Sútra-dhár or *Chhutár*	Carpentry.
Ráj-bansí or *Tiyor*..	Principally masonry.
Kapáli	Spinning and selling hemp thread.
Rajak or *Dhobá* ...	Bleaching and washing clothes.
Cháshá-dhobá ...	Preparing and selling rice, &c.
Kalu	Manufacturing and selling oil.
Kol	Uncertain.
Karangá	Uncertain.
Shoundika or *Shunrí*	Distilling and selling spirits and so forth.
Pátní	Ferry-man.
Kán	Singing and so forth.
Gánrár	Preparing and selling *chirá*. ‡
Kánrrá	Making and selling bamboo baskets.
Duliyá	Carrying palkees, &c., on the shoulders, doing the work of a bearer.
Báorí .. .	*Ibid.*
Bágdi	Generally, catching and selling fish.
Pod	*Ibid.*
Bediyá	Selling medicinal drugs.

* *N. B.* There is a tradition that *Madhu Nipit* (a shaver named *Madhu*,) after shaving the head of *Choitanya Deva* (See the Preface, Note) at the time of his becoming a *Sannyisi*, was unwilling to cut thereafter the toe-nails of any other person, upon which *Choitanya Deva* directed him to follow the profession of a confectioner; and since that time he and his relations became confectioners, and in consequence they formed a class different from that of the other shavers.

† See page 660. *Koivartu* is, at present, reckoned to be one of the *Shúdra* castes.

‡ Paddy when wetted, parched, and flattened.

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CASTE OR CLASS.	PROFESSION.
Korá	Digging or excavating tanks, canals, &c.
Chunárí	Preparing and selling lime.
Báití	Playing on the *dhol*,* and preparing and selling mats.
Chandál, Chánrál or *Namo-shúdra* ...	Preparing date *goor*, and cultivating lands.
Hári	Keeping and selling swine and selling swine's flesh; scavengering and carrying filth.
Káorá	Keeping and selling swine.
Dom	Making and selling bamboo baskets, &c.
Murdá-farásh ...	Preparing funeral piles, carrying or dealing with dead bodies.
Muchi, Charma-kár, or *Ruhidás* ...	Skinning dead and slaughtered animals, tanning, selling hides, leather, &c.; playing on the *dhol, dhák*,† &c.; weaving cloths.

There are also many mixed castes and degraded classes of *Kshatriyas* and *Voishyas* who pass as *Shúdras*.

721. As, at present, each of the mixed and sub-castes is, like a primitive caste, held to be a separate or distinct tribe, and intermarriage between any two of them is partly abrogated and obsolete, and partly customably obsolete, ‡ it is determined that a marriage so contracted is invalid, unless sanctioned by custom, and the issue of such marriage is not entitled to inherit patrimony.

* A drum of a particular description which the drummer carries by slinging it round his neck with a cord.

† The drum of the largest kind, carried by the left arm and shoulder, and played only on one side.

‡ See *ante*, p. 173, and precedents pp. 394-398.

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GENERAL NOTE.

The learned *Hindús* are unanimously of opinion, that many laws enacted by MANU, their oldest reputed legislator, were confined to the three first ages of the world, and have no force in the present age, in which a few of them are certainly obsolete; and they ground their opinion on the following texts, which are collected in a work entitled *Madana-ratna-pradípa.*

I. CRATU:—In the *Cali* age a son must not be begotten *on a widow* by the brother *of the deceased husband;* nor must a damsel, once given away *in marriage* be given *a second time;* nor must a bull be offered in a sacrifice; nor must a waterpot be carried *by a student in theology.*

II. VRIHASPATI:—1. Appointments *of kinsmen to beget children on widows or married women, when the husbands are deceased or impotent,* are mentioned by the sage MANU, but forbidden by himself with a view to the order of the four ages: no such act can be legally done in this age by any others *than the husband.*

2. In the first and second ages men were induced with the true piety and sound knowledge; so *they were* in the third age; but in the fourth, a diminution of their *moral and intellectual* powers was ordained *by their Creator.*

3. Thus were sons of many different sorts made by ancient sages, but such cannot now be adopted by men destitute of those eminent powers.

III. PARÁSARA:—1. A man, *who has held intercourse with a deadly sinner,* must abandon his country in the first age; he must leave his town, in the second; his family in the third age; but in the fourth, he needs only desert the offender. 2. In the first age, he is degraded by mere conversation with a degraded man; in the second, by touching him; in the third, by receiving food from him; but in the fourth, the sinner alone bears his guilt.

IV. NÁRADA:—The procreation of a son by a brother *of the deceased,* the slaughter of cattle in the entertainment of a guest, the repast on fleshmeat at funeral obsequies, and the order of a hermit *are forbidden or obsolete in the fourth age.*

V. *Áditya-purána:*—1. What was a duty in the first age must not *in all cases* be done in the fourth; since, in the *Cali Yuga,* both men and women are addicted to sin.

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2. Such are a studentship continued for a very long time, and the necessity of carrying a waterpot, marriage with a paternal kinswoman, or with a near maternal relation, and the sacrifice of a bull.

3. Or of a man, or of a horse; and all spirituous liquor must in the *Cali* age be avoided by twice-born men; so must a second gift of a married young woman, *whose husband has died before consummation*, and the larger portion of an eldest brother, and procreation on a brother's widow or wife.

VI. Smriti:—1. The appointment of a man to beget a son on the widow of his brother: the gift of a young married woman to another bridegroom, *if her husband should die* while she remains a virgin;

2. The marriage of twice-born men with damsels not of the same class; the slaughter, in a religious war, of *Bráhmans*, who are assailants with intent to kill;

3. Any intercourse with a twice-born man, who has passed the sea in a ship, even though he have performed an expiation; performances of sacrifices for all sorts of men, and the necessity of carrying a waterpot;

4. Walking on a pilgrimage till the pilgrim die; and the slaughter of a bull at a sacrifice; the acceptance of spirituous liquor even at the ceremony called *Sankrámaní*;

5. Receiving what has been licked off, at an oblation to fire, from the pot of clarified butter; entrance into the third order, or that of a hermit, though ordained *for the first ages*;

6. The diminution of crimes in proportion to the religious acts and sacred knowledge *of the offenders*; the rule of expiation for *a Bráhman* extending to death;

7. The sin of holding any intercourse with sinners; the secret expiation of any great crimes except theft; the slaughter of cattle in honor of eminent guests or of ancestors;

8. The filiation of any but a son legally begotten or given in adoption *by his parents*; the desertion of a lawful wife for any offence less than actual adultery:

9. These *parts of ancient law* were abrogated by wise legislators, as the cases arose at the beginning of the *Cali* age, with an intent of securing mankind from evil.

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On the preceding texts it must be remarked, that none of them, except that of VRIHASPATI, is cited by KULLÚKA, who never seems to have considered any other laws of MANU as restrained to the three first ages; that the SMRITI, or sacred code, is quoted without the name of the legislator; and that the prohibition, in any age, *of self-defence*, even against *Bráhmans*, is repugnant to a text of SUMANTU, to the precept and example of KRISHNA himself, according to the *Mahábhárata*, and even to a sentence in the *Veda*, by which every man is commanded *to defend his own life from all* violent aggressors. MANU, pp. 363—366.

ADDENDA.

ABSTRACT OF THE LAW OF INHERITANCE, &c., AS CURRENT IN THE SCHOOLS OTHER THAN THAT OF BENGAL.

Cause of heritable right.

The inchoate right arising from birth, and the relinquishment by the occupant (whether effected by death or otherwise) conjointly create the heritable right, the inchoate right which previously existed becoming perfect by the owner's death (natural or civil) or his voluntary abandonment.†

Order of succession.

When a person's right of property ceases by death, by degradation, by the quitting of the condition of a householder, or by voluntary abandonment, the property devolves on the son; in default of the son, the grandson, and failing him, the great-grandson, takes the inheritance; the grandson, whose father is dead and the great-grandson, whose father and grandfather are dead, inherit simultaneously with the (late proprietor's) surviving son: such grandsons and great-grandsons, however, inherit *per stirpes* and not *per capita*. In the case of the property having been already divided, the widow succeeds‡ in default of the great-grandson: she cannot, however, dispose of the smallest part by gift, sale or the like, except for purposes indispensably necessary, and certain other objects or purposes allowed by law; it follows then that she can be considered in no other light than as a holder in trust for certain uses; so much so, that should she make waste, they who have the reversionary

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* For particulars see *Vyavasthá-Chandriká*.

† See Macn. H. L., Vol. I, p. 2, *Ante*. pp. 5 and 9.

‡ According to the doctrine of the *Smriti-chandriká*, which is of great and paramount authority in the South of India, a widow, being the mother of daughters, takes her husband's property, both movable and immovable, where the family is divided; but a childless widow takes only the movable property. Where there are two widows, one the mother of daughters, and the other childless, the former alone takes the immovable estate, and the movable property is equally divided between them.

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interest have clearly a right to restrain her from so doing.* In default of the widow, the daughter succeeds;† if there be an unmarried daughter, then, according to the law of Benares, she would take the inheritance to the exclusion of other daughters; failing her, the succession devolves on the married daughter who is indigent; in her default, the wealthy daughter succeeds: but no preference is given to the daughter who has, or is likely to have, male issue, over a daughter who is barren or a childless widow. According to the *Mithilá* law also, the unmarried daughter succeeds first; failing her, the married daughters are, without distinction, entitled to the inheritance; the daughter who is married, and has, or is likely to have, male issue, is not preferred to one who is widowed and barren; nor is there any distinction made between indigence and wealth. In default of the daughter, the daughter's son inherits:† if there be many daughter's sons, they inherit *per capita*, and not *per stirpes*. The *Mithilá* authorities hold that the daughter's son should succeed after (that is, on failure of) the father. Failing the daughter's son, the natural mother,† in her default, the father, succeeds. The father, however, would succeed immediately after the great-grandson in the case of the estate being joint and held in co-parcenary (excluding the widow and the rest.) In default of him, the brother of the whole blood succeeds, in his default the brother of the halfblood; then their sons inherit successively; next the paternal grandmother,† then the paternal grandfather, the paternal uncle of the whole blood, of the half blood, and their sons successively succeed; next the paternal great-grandmother,† the paternal great-grandfather, his son and grandson successively; then the paternal great-grandfather's mother,† his father, his brother, his brother's son, successively succeed. In default of all these, the *sapindas* in the same order as far as the seventh degree in ascent (enumerated from the late proprietor inclusive.) In default of

* The property inherited by a woman is etymologically described in the *Mitákshará* to be a *woman's* property or *stri-dhan*, and it being so, she according to this authority might be said to be at liberty to make any disposition thereof; and the property would devolve on the heir of her proper *stri-dhan*; but it appears from the author's own writing that with respect to such property the woman is under the control of her husband's heirs; consequently it may be fairly concluded that, according to the *Mitákshará* also such property should devolve on the heir of her husband, and not on the successor to her proper *stri-dhan*. And the *Vira-mitrodoya*, which also is a great authority in Benares, has clearly laid down that, after her death, the heir of her husband is the successor to the property inherited by her from him. The Courts of Justice too, have all along treated this property not as *stri-dhan*, but as ordinarily inherited property. Thus there exists no apprehension of its becoming a *woman's peculium*.

† The daughter, mother, grandmother, great-grandmother, and great-great-grandmother too, are, like the widow, restricted by law from making a gift or other disposition of the property without a proper and legal cause. And they, as well as the daughter's son, are not entitled to inherit if the property be joint and undivided, in which case they and they only, who are said to have been entitled, on the non-existence of the widow and the rest above mentioned, would inherit.—*Vide* Macn. H. L., Vol. I, p. 22.

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sapindas, the succession devolves on the *samánodakas* (kinsmen allied by a common libation of water,) who are kinsmen as far as the fourteenth degree, including those above enumerated. In default of the *samánodakas*, the *bandhus* or cognates succeed. These kindred are of three descriptions, personal, paternal, and maternal. The personal kindred are the sons of his own father's sister; the sons of his own mother's sister, and the sons of his maternal uncle. The paternal kindred are the sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle. The maternal kindred are the sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle. Here by reason of near affinity, the cognate kindred of the deceased himself succeed first, on failure of them, his father's cognate kindred, in their default, his mother's cognate kindred inherit.

In default of them, the *A'chárjya* or spiritual preceptor, the pupil, fellow student in the *Vedas*, and *Bráhmans* learned in the *Vedas* successively succeed: and lastly, always excepting the property of *Bráhmans*, the estate escheats to the ruling power.

In the *Vyavahára-Mayúkha*, an authority of great eminence in the West of India, a considerable deviation from the above order appears, and the heirs after the mother are thus enumerated. The brother of the whole blood, his son, the paternal grandmother, the sister, the paternal grandfather and the brother of the half blood, and the great-grandfather, paternal uncle and the son of the brother of the half blood inherit together. In default of these, the *sapindas*, the *samánodakas*, and the *bandhus* inherit successively, according to their degrees of proximity.

ADOPTION.

The law of adoption does not exhibit much conflict of doctrines between the several schools. It must be known, however, that in Bengal and *Drávira* (the Deccan) the *Dattaka-chandriká* being respected and followed in preference to the *Dattaka-mímánsá* and the other works (on the subject,)* the adoption rules followed in this country are the same as those in force and acted upon in the Deccan; whereas in the other schools the *Dattaka-mímánsá* being followed in preference to the other works, the differences (in the doctrines of adoption) between those schools and of the Bengal or Deccan school are the same as those between the *Dattaka-Chandriká* and *Dattaka-Mímánsá*. Of those, the material ones are as follows:—In the schools other than Bengal and Drávira, a *Dattaka* son must be adopted previous to his initiation by the ceremony of tonsure, and be-

* The doctrines of the *Dattaka-mímánsá, &c.*, are also respected and followed in this country, with the exception of such of them as are contrary to the doctrines of the *Dattaka-chandriká*.—See the Preface.

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fore the fifth year of his age. And although a boy, whose tonsure has been performed within the fifth year of his age (in the family of the natural father) may be adopted, yet he cannot become a *Dattaka* son in the ordinary form, but must be considered an *Anitya Dwyámushyáyana*, notwithstanding the tonsure be repeated in the family of the adopter; whereas *in* Bengal and the Deccan a twice-born man may adopt a son before the *Upa-nayana*, and a *Shúdra* before the marriage, of the boy. In the two latter schools, a wife cannot adopt a son without her husband's consent or authority, whereas in the Benares and other provinces she can do so with the sanction of her husband's nearest of kin,—*viz.*, her father-in-law and the rest. In the case of famine or a like distress, a woman can, of her own authority, give a son for adoption in the provinces other than Bengal and Drávira. Where a legitimate son is born subsequently to the adoption, (he and the adopted son inherit together); but the adopted son takes one-third according to the law of Bengal and Deccan, and one-fourth according to the doctrine of the other schools.*

According to the *Mayúkha*, an authority of the greatest eminence among the *Mahrattas*, the restriction as to age relates only to cases where no relationship subsists; but when a relation, or *sa-gotra* (a person of same race,) is to be adopted, no obstacle exists on account of his being of mature age, married, and having a family.

The *kritrima* form of adoption prevails in *Mithilá*. In other provinces also, recourse may be had to this form of adoption wherever it is legalized by the local usage or family custom.

STRI'-DHAN.

If a woman die without issue, that is, leaving no progeny, in other words, leaving no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son, the woman's property, given by affectionate friends and so forth, shall be taken by her husband and the rest.—Of a woman, who dies without issue, as before stated, and who had become a wife by any of the four modes of marriage denominated *Bráhma*, *Daiva*, *A'rsha* and *Prájápatya*, the property belongs in the first place to her husband. On failure of him, it goes to his nearest kinsmen (*Sapinda*) allied by funeral oblations. But, in the other forms of marriage, called *A'sura*, *Gándharva*, *Rákshasa* and *Poishácha*, the property of a childless woman goes successively to her mother and father. On failure of them, their next of kin take the succession. In all forms of marriage, if the woman leave

* In other respects the doctrin of the *Dattaka-mímánsá*, &c., generally agree with, and do not materially differ from, those of *Dattaka-chandriká*.

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progeny, her property goes first to her daughter.* And here in the case of competition between married and maiden daughters, the unmarried take the succession; but, on failure of them, the married daughters; and here again in the case of competition between such as are provided and those who are unendowed, the unendowed take the succession first; but, on failure of them, those who are endowed. But this (rule, for the daughter's succession to the mother's goods) is exclusive of the fee or gratuity; for that goes to the brothers of the whole blood. On failure of all daughters, the granddaughters in the female line take the succession. If there be a multitude of these [granddaughters,] children of different mothers, and unequal in number, shares should be allotted to them through their mothers. But if there be daughters as well as daughter's daughters, a trifle only is given to the daughter's daughters; on failure of daughter's daughters, the daughter's sons are entitled to the succession. If there be no grandsons in the female line, sons* take the property; on failure of sons, grandsons inherit their paternal grandmother's wealth. On failure of grandsons also, the husband and other relatives above mentioned are successors to the wealth.†

Should a damsel, any how affianced, die before the completion of the marriage, let the bridegroom take back the gifts which he had presented, paying, however, the charges on both sides. But her uterine brother shall have the ornaments for the head, and other gifts which may have been presented to the maiden by her maternal grandfather, or other relation; as well as the property which may have been regularly inherited by her. On failure of them, it shall belong to the mother; or if she be dead, to the father.

In certain circumstances, a husband is allowed to take his wife's goods in her life-time, and although she have issue. For instance, in a famine, for the preservation of the family or at a time when a religious duty must indispensably be performed, or in illness, or during restraint or confinement in prison or under corporal penalties, the husband, being destitute of other

* Mádhyáchárjya contends that sons and daughters inherit their mother's *peculium* together, only where it was derived from the family of the husband.

† *Vide* Coleb. *Miták.* Chap., II, Sect. 11, § 9—33; Str. H. L., Vol. II, pp. 247,248; also Macn. H. L., Vol. I, pp. 38—40.

Sir William Macnaghten, adopting in his book *Srí-krishna Tarkálankáras* order of succession to the *Stri-dhan*, says: "The order above given is chiefly taken from Colebrooke's translation of the *Dáya-bhága*, page 100. I do not find that the law in this particular varies materially in the different schools; except that (as in the case of succession to ordinary property) a distinction is made by the law of Benares, and other schools, between wealthy and indigent daughters." But the order of succession which is adopted by him and which in truth is exclusively according to the Bengal law, is far different from that laid down by the authorities of the other schools; as will be manifest by collating the order of succession, above set forth (which being taken from the *Mitákshará*, is according to the law other than that of Bengal) with that given at page 40, Vol. I. of Macnaghten's work.

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funds and therefore taking his wife's property, is not liable to restore it. But if he seize it in any other manner, or under other circumstances, he must make it good. The property of a woman must not be taken in her life-time by any relation other than her husband; and such ornaments as are worn by women during the life of their husbands, the heirs of the husband shall not divide among themselves: they who do so are degraded from their tribe.

ALIENATION OF THE UNDIVIDED OR DIVIDED PROPERTY.

THE Hindú law, as current in the provinces other than that of Bengal, not recognising any individual co-parcener's proportional right in the joint property, none of the co-parceners in those provinces is competent to make a gift or other disposition of the undivided estate. Nevertheless, while the sons and grandsons are minors, and incapable of giving their consent to a gift and the like, or while brothers are so and continue unseparated, even one person, who is capable, may make a gift, mortgage or sale of immovable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable.* The man, who has no son, grandson, or great-grandson in the male line, has absolute power over the property real or personal, ancestral or self-acquired; but he who has an heir or heirs of the above description, can alienate the movable property, ancestral or self-acquired, for purposes prescribed by law, but cannot alienate the self-acquired real property without the consent of such heir or heirs; but he has no power to alienate the ancestral real property, because in such property the right is always limited; and the sons, grandsons, and great-grandsons of the occupant, supposing them to be free from those defects, mental or corporeal, which are held to defeat the right of inheritance, are declared to possess an interest in the property in question equal to that of the occupant himself.† So much so that he is not at liberty to alienate it, except under especial and urgent circumstances.‡

In other respects there is no material difference between the law as current in Bengal and that in the other schools.

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* *Vide* Coleb., *Miták.*, Ch. I, Sect. I, §, 29.

† *Vide* Coleb., *Miták.*, Ch. I, Sect. I, § 3 & 27.

‡ See Macn. H. L., Vol. I, pp. 2 and 3.

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